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Theory and Practice
OF THE
LAW OF EVIDENCE.

THE
THEORY AND PRACTICE
OF
THE LAW OF EVIDENCE.

BY
WILLIAM WILLS,
OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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TO
THE HONOURABLE SIR ALFRED WILLS,
ONE OF THE JUDGES OF THE QUEEN'S BENCH DIVISION
OF THE HIGH COURT OF JUSTICE,
THIS BOOK IS
GRATEFULLY DEDICATED.

P R E F A C E.



THIS Book has grown out of a course of lectures on the Law of Evidence delivered to the Students of the Incorporated Law Society in 1889. It has been written with a twofold aim, namely, to present the theory and general principles of the subject in such a clear and readable form as to be intelligible to the student, and at the same time to combine therewith such amount of detail as may render it of practical utility for the ordinary run of *nisi prius* and criminal work.

The theory of the law is a remarkable one, and a general view of it as a whole appears to me to be very important for a right understanding of many of the practical rules which have flowed from it. It has been set forth, according to my reading of it, in the Introduction, and is further enforced by the arrangement of the whole work and the treatment of its various parts.

To the practitioner as well as to the student the Law of Evidence presents some difficulties. It is not easy, for example, to define exactly the scope and limits of such heads of Evidence as Declarations as to Violence or as to

Pedigree, or Reputation as to Public and General Rights ; and the same is true of other titles. Special pains have been taken to present these more difficult parts of the subject in a clear and intelligible form.

The subject of Public Documents, except in so far as it is governed by a few general principles, appears to be little suited for discussion in the body of the text, at any rate in the case of a work of this size ; and it has accordingly been reserved in the main for an Appendix, which it is hoped may give sufficient information for ordinary use, and in any case afford, from the method of its arrangement, a ready means of reference.

In attempting to treat, within so small a compass, of so large a subject as the Law of Evidence, it is inevitable that much should be omitted. Such a branch of the law as either Presumptions or Public Documents would suffice alone to fill an ample treatise. It is necessary therefore to make some compromise. In doing this, the aim which I have followed has been, as far as possible, to give most consideration to those parts of the subject which are of greatest practical importance, subject always to presenting a fairly complete view of the whole.

I ought also to mention here that I have omitted from this Book some subjects which are generally included in works on Evidence. Such are Acknowledgments under the Statutes of Limitations, the Law of Estoppel, and almost all Conclusive Presumptions. These have not been included, because they appear to me to belong in principle to other branches of the law.

With regard to the citation of authorities, inasmuch as decisions on questions of evidence are often very briefly reported, and consist very largely of rulings and dicta at *nisi prius*, it has seemed to me to be generally a convenient practice to cite, where possible, several authorities in support and illustration of the same proposition.

I desire in conclusion to express my thanks to my friend MR. J. G. PEASE, of the Western Circuit, for the very valuable assistance that he has given me in many parts of my work, and especially in the preparation of the Appendix of Public Documents and the final revision of the whole MS.

W. W.

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October, 1894.

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The Theory and Practice
OF THE
LAW OF EVIDENCE.

INTRODUCTION.

EVIDENCE is a term which implies a relation. It means in general any fact or statement of fact regarded as tending, when presented to the mind, to produce a persuasion concerning the existence of some other fact—a persuasion either affirmative or disaffirmative of its existence.

Legal Evidence is a general term given to any fact or statement of fact in contemplation of its being presented to the cognizance of a court of justice for the purpose of producing a persuasion concerning the existence of some other fact or facts which are in question, and upon the determination of which the decision of the court may be based (*a*).

The Law of Evidence is the body of rules which prescribe generally what are the relations which must exist between one fact and another in order that the one may be used as evidence of the other, and by what means and in what manner facts which may be so used as evidence may be presented to the cognizance of the court.

In the system of trial by jury, under which the law of evidence has principally grown up, it is a settled rule that it is for the judge to decide as a matter of law whether any particular fact is fit to be laid before the jury as evidence,

(*a*) Bentham's definitions, slightly modified; see Bentham's Works (1843) Vol. 6, p. 208.

and for the jury, with his assistance, to determine as a matter of fact what weight they will give to it when so presented. Hence the law deals principally with the admissibility of evidence and has little to say as to the weight of it when admitted. And this distinction between fact and law in matters of evidence exists no less in trials without a jury, although the two functions of judge and jury are united in one person.

The broad difference between evidence as defined by law and evidence as commonly understood is that the law imposes numerous restrictions which are not observed in the ordinary intercourse of life. These restrictions have been devised with a two-fold aim : to exclude evidence of all facts save such as have some reasonable connection with the matter in dispute, and to secure that the evidence of these facts which is admitted shall, so far as rules of law can ensure it, be such as is of a credible character. These considerations have been embodied in two great principles, the application of which to the various cases which have come before the courts has developed almost the whole of the law of evidence.

The first of these principles is that a party may prove all Facts that are Relevant to the issue and no others.

The term issue, which literally means end and denotes that stage of the pleadings in a cause where the parties have arrived at a simple contradiction of fact, is applied to every proposition of fact in the pleadings which is affirmed by either of the parties and is denied by his opponent. The full name given to these propositions is "points in issue," or more often "facts in issue." These expressions are equivalent, since "facts in issue" must here be understood as denoting the conclusions of fact as to which the parties are in contradiction, not the details of fact, also controverted, which will be given in evidence to establish or to defeat them. The old system of pleading had the effect of defining the issues with special precision, but they must of necessity exist in all litigation,

whether written pleadings are used or not, and until they are clearly defined the admissibility of any particular matter of evidence cannot be properly tested nor can judgment be rightly given in the case.

In every such issue one of the parties alleges and the other denies some act or transaction, simple or complex as the case may be, such as a demise by lease, a breach of covenant, an accord and satisfaction, a murder, or the like. To present any such transaction to the cognizance of the court every constituent part of it must be proved, as for instance, in the case of a demise by lease, the execution of the lease by signing, sealing and delivering, and the entry of the lessee into possession of the demised premises. If since the demise the lessor has died having devised his reversion to his son who now claims against the lessee, this transmission of interest, if not admitted, will be a further fact in issue, of which the constituent parts will be the due execution of the will and the death of the testator. Hence all such facts as these, which go to constitute the transaction in issue, are necessarily relevant to the issue. What facts do thus compose and constitute any given transaction which is in issue is a matter which is determined partly by the substantive law applicable to it and partly by the incidents of the particular transaction itself. Thus the law defines what constitutes a valid demise, but the entry into possession, which is an essential part of the transaction, may in one case consist of a single act, and in another of a series of acts, as various parts of the premises are taken into occupation. So again, if possession was taken under the lease by an agent of the lessee, the authority given to the agent, as well as the acts constituting his entry into possession, will be relevant facts. Hence the question how far it is legitimate to go into detail and incident in proving the several constituent parts of any transaction depends in the first instance on the nature of the particular transaction itself. But it may

also be affected by another cause, namely the inability to present to the court the testimony of eye-witnesses as to some fact which is a constituent part of the transaction, whence it becomes necessary to establish such fact by proving a number of details which were connected with it, forming the surrounding circumstances of which it is, so to speak, the centre, and which details when established make it certain or probable that such central fact did itself happen or exist. This is well exemplified in many cases of secret crime where almost the whole of the evidence is circumstantial. A like result also happens in other cases where evidence is given by eye-witnesses of a fact, but doubt is thrown on their truthfulness or accuracy, as may be seen in greater or less degree in almost every case where there is a strenuous contest between the parties.

As every constituent part or detail of the fact or transaction in issue is or may become a relevant fact, so the converse proposition is generally true, that no facts, however similar to those in issue, are relevant, unless they can be shown to be so connected with them as to form in some sense part of the same transaction. The most notable application of this doctrine is this, that, save in a few special instances, a man's previous conduct and character are not considered relevant to the issue whether he did or did not do a particular act.

In short, the relevant facts are for the most part such facts as form the parts and details of the particular transaction in question, whether they be the principal elements in it or only its subordinate incidents, together with such further facts as may be necessary to identify or explain them.

The second great principle of the law of evidence assumes that the relevant facts have been defined and has for its aim to secure the credibility of the evidence by which they are to be proved. It is this, that a fact must be proved by means of the Best Evidence which the nature of the

case will admit. But this principle, unlike the last, is hardly more than a maxim, and its import can only be understood by reference to the numerous rules by which it has been worked out. These fall into two classes.

The first class comprises those rules which relate to the various forms of testimony or Media of Proof which the law admits.

Save in a few cases where the jury are able to take direct personal cognizance of some of the relevant facts, as by the view of a house in an action for dilapidations or the inspection in court of a stolen jewel or of a deed charged to be forged, all the relevant facts must be presented to them through the medium of some form of narrative or record. It was early laid down that the best, that is, the most credible, means of proof was the oral testimony delivered upon oath in open court of a competent witness who had with his own senses perceived the particular fact to be proved. Not every person was competent to testify even of such facts; a witness might be defective in mental capacity or might be disqualified by the bias of self-interest; and until recent times the latter ground of incompetency was far-reaching in its effects, disqualifying all the parties to the proceedings as well as other persons related to them in certain defined ways. It has now however been abolished in civil, and restricted in its operation in criminal cases, while the common law rules as to natural incompetency remain almost unaltered. Assuming then that the witness is competent, it is the sanction of the oath, the appearance for examination and cross-examination in court, and the direct personal knowledge of the witness, which are deemed the best conditions for the ascertainment of the truth.

The condition as to direct personal knowledge is best known through the familiar maxim *Hearsay is no evidence*; that is, the witness must not repeat as evidence the statements of other persons. Necessity however compelled the

admission of exceptions. It frequently happened that a person who had direct personal knowledge of some important fact died, having however previously made a statement about it to some other person, or left a record of it in writing, in circumstances in which to have excluded evidence of such statement or record would have led to a defeat of justice. Accordingly in certain cases the law permitted a witness to prove statements of fact made to him by other persons since deceased. These are technically known as declarations, and the persons who make them as declarants, though these terms do not import that the statement need be in writing or made in any particular form. The dying statements of a murdered man as to how he came by his death, and the written entry of a transaction recorded by a clerk or agent in the course of his duty, are examples of such declarations; and the characteristic of them both is this, that the evidence of the fact is presented, so to speak, through two witnesses, the deceased man who had direct personal knowledge of the fact, and the living witness who repeats his statement to the court. The living witness complies with the general principle in so far as it requires his appearance for examination in court, and the sanction of the oath, but violates it in so far as it excludes hearsay evidence and requires direct personal knowledge; his information is second-hand, and in this respect he plays the part of a mere reporter who brings into court the informal testimony of another person. The deceased man on the other hand had that direct personal knowledge which is required in a witness, though he cannot appear in court to be sworn nor be cross-examined as to his knowledge and recollection. But his resemblance to a living witness goes farther than this; for the law requires, before his declaration can be received, that it shall be shown to possess some guarantee of credibility in lieu of that sanction which the oath affords. The declaration of the dying man as to who it was that slew him must

be shown to have been made when he had the fear of approaching death before his eyes, and when in fact it was imminent, else it cannot be given in evidence against the man who is charged with having killed him. The law deems that what a man says at such a solemn moment is as likely to be true as if he had sworn to its truth in open court. And the declaration of the clerk is considered *prima facie* credible only if it is shown that it was made in the regular course of his business, and that it was his duty to make it.

Thus even where it is impracticable to insist on the best evidence of all—an eye-witness's sworn testimony in court—the law, regarding such evidence as a standard or type, has sought, as far as possible, to secure like characteristics in the other forms of testimony which it admits. There are several however among these in which the departure from this standard is greater than in the declarations just referred to. When it is sought to prove the origin or long enjoyment of ancient rights, or to establish a family pedigree, it is not practicable to insist that only those statements of deceased persons shall be admitted in evidence which are confined to facts within the declarant's own personal knowledge; in such cases therefore declarations are admitted although they may present the result of hearsay without any definite limit, or, in other words, mere general tradition. The only guarantees of credibility which the law can exact are, first, that the declarant himself, and those from and through whom the tradition has come down to him, shall all have belonged to the class of persons interested in learning and transmitting a true account of the matter, namely, in the one case the persons interested in the ancient right, in the other the members of the particular family; and secondly, that his declaration shall not have been made after a controversy had already arisen in which he might be interested, since that would raise a just suspicion of bias and prejudice. In the case of other exceptional forms of testimony the analogy or resemblance to the

leading type, direct oral evidence, is still less marked, as for instance in the case of public documents, such as registers of births deaths and marriages. The law gives credit to the entries in such documents because it may be presumed, till the contrary is shown, that the officials who prepared them duly performed their public duties and ascertained the truth of the facts which it was their office to record. Of all these exceptions the most important in practice, though less striking than some of the others as an example of the general theory which governs them all, are admissions; that is to say, statements which have been made out of court by a party to the proceeding and against his own interest therein, and on that ground presumed to be true and allowed to be proved against him by his opponent.

Direct oral testimony and these various forms of indirect testimony have never possessed any uniform collective title. The latter, when regarded merely as portions of the testimony of the living witness, are correctly described as exceptions to the rule against hearsay. But they are also capable, as we have seen, of being themselves regarded as informal depositions of deceased or absent persons which the living witness simply lays before the court. This appears indeed, when the definitions of them are examined, to be their most striking aspect, and accordingly many of them have, as such, independent names, as declarations, admissions, confessions, and the like. It appears convenient therefore to apply to them and to direct oral evidence one general title which may fitly denote their common character; and although it is impossible to choose any term which is entirely free from objection, it seems that on the whole they may most aptly be called the *Media of Proof*. Direct oral evidence may then be described as the principal medium of proof, and the various forms of indirect testimony which have been referred to as exceptional or subordinate media of proof. But these terms must be understood only as expressing their

relation to each other in the theory of the law, and not as implying that the subordinate media are only admissible when direct oral evidence is unavailable.

From the foregoing statement it will be gathered that in a large number of cases the relevant facts consist almost entirely of acts of the parties or their agents or their predecessors in title,—acts which create the rights and liabilities of the parties or which form part of the whole transaction which does so—while the media of proof consist of various forms of narratives or records, proceeding either from the parties themselves or from other persons, by which such acts may be proved. This distinction however between Act and Narrative, clear enough in idea, is not always easy to draw in practice in regard to some of the subordinate media of proof. This may be explained by stating the relation between the latter and the relevant facts in the following way.

Most acts and transactions which are the ground of legal rights and liabilities are the subject of discussion, either at the time or afterwards, between the parties engaged in them, their agents, and other persons who feel interested in them. They are, so to speak, like the acts of a drama followed by the criticisms of both actors and spectators. The references thus made to a transaction, whether they be written or oral, stand to the transaction in the relation of narrative to act narrated. Now the best way, it is true, to prove the transaction would be to call as witnesses the persons who have been actors in it or spectators of it; but this is not always convenient or even possible, for some of them may be hostile to the interests of the party who desires to prove the transaction, and others may be dead or for other reasons unable to attend. In such event, these narrative statements, although they have not the solemnity of the sworn testimony in open court of an eye-witness, yet in certain cases and subject to certain conditions are allowed, as already stated, to be reported in court by some witness who can prove them

to have been uttered or written, as if they were a kind of informal depositions as to the facts they refer to. But a transaction may itself consist in whole or part of statements, as in the case of a libel or slander, or the representations of fact which form the basis of a contract, and the like; or it may, although not consisting of statements, be accompanied so closely by them as to make it difficult to separate them from the transaction. In either of these cases it is often a matter of fine distinction to say at what particular point the transaction is to be deemed complete, so that all further statements connected with it must be regarded as merely references to it and not parts of it. And the practical importance of the distinction is this, that whereas if the statements form part of the transaction they are at once admissible as relevant facts, they are not necessarily admissible if they are only narrative in their character, since not all narrative statements regarding the relevant facts are admitted as media of proof, but only such as comply with certain prescribed conditions.

Thus, A sues B for slanders uttered in the course of a quarrel. Towards the close of the dispute B made an offer of peace, involving an admission that he had been in the wrong, coupled however with a somewhat offensive expression, from which express malice (which is one of the issues in the action) might perhaps be inferred. The offer was made on the condition that if A refused it, it should be regarded as never having been made. A refuses it. Is B's offer and statement a part of the transaction in issue, so that it can be given in evidence against him as such, or should it be regarded as merely a reference to the quarrel? In the latter case it may be held not admissible, since admissions which are made with a view to settlement and on the terms that they shall not be given in evidence against the party making them, are generally privileged.

Again, A sues B for breach of warranty of the quality of certain goods which B has sold and delivered to him. The

bargain was made between A and an agent of B, who had authority to sell the goods on his behalf. A tenders in evidence, to prove the warranty, a statement made by B's agent at the interview when the goods were bought. B objects to its admissibility on the ground that the bargain had already been struck at the time when it was made. If it was made by the agent in order to induce A to buy, it is clearly part of the transaction; but if it was only a comment on the quality of the goods after they were bought, it would not generally be admissible, as an agent has not ordinarily any authority to bind his master by observations unnecessary for the conduct of any business in hand and referring merely to transactions already completed.

Again, A is indicted for having assaulted B, who, on being struck, cried out that she was hurt, and afterwards made a complaint about A to a friend. Is the complaint, like the cry, to be regarded as part of the transaction, or is it a subsequent narrative of it? If the latter, is it admissible as a medium of proof, and, if so, under what conditions?

It is in connection specially with questions of this kind that statements which are held to be part of the transaction in issue, and so relevant facts, are termed *Res Gestæ*, in order to distinguish them from those statements which are merely Narrative; and it is in the solution of such questions that the law draws with some nicety the boundary line between the relevant facts on the one hand and narratives, which may or may not be admissible as media of proof, on the other.

The second class of rules which work out the principle that the facts must be proved by the best evidence that the nature of the case will admit, consists of those which have been laid down as to the Adduction of Evidence, or, in other words, as to the particular manner in which testimony, both oral and documentary, must be presented to the court. Thus a party is not entitled to examine his own witness in such manner as to prompt what he shall say on any disputed point, nor may

he ask him questions for the mere purpose of accrediting him with a reputation for truthfulness, when his character has not been attacked. On the other hand, a party is entitled not merely to prompt but to press his opponent's witness, by means of leading questions, to accept in whole or part his own version of the facts in issue. He is entitled also, if the witness repudiates that version, to cross-examine him within certain limits on matters not relevant to the issue, in order to impeach his credibility as a witness in the cause, a part of evidence which occupies a far wider field in practice than the space allotted to it in the theory of the subject would seem to import. The adduction of documents is governed by rules having a similar object, the ascertainment of the truth. All documents which have not a public official character must, if not admitted, be properly verified by evidence before they can be read to the jury. If possible, the original must be produced in court, so that it may be inspected. It is only in certain events, carefully defined, that a copy or oral evidence of its contents may be adduced instead.

It is apparent from what has been said above that the term evidence is used in several different senses and that when it is contended in any given case that a particular document, or the answer to some proposed question, is not admissible as evidence, this may cover several different grounds of objection. For example, A, the tenant of a large farm, is prosecuted for the murder of B, who was his landlord. The prosecution seek to prove that five years previously a notice to quit a small close had been served on behalf of B upon A, and tender in evidence a copy of an entry made in a notebook, kept by a deceased clerk of B, stating the service by such clerk of the notice to quit. The circumstances of the case might be such that the evidence might be objected to on the part of the defence as inadmissible on any of the following grounds:—(a) that the service of the notice to quit was not *relevant* to the issue whether A murdered B, being

too small and insignificant a circumstance to form a motive for the crime; (b) that the entry of the deceased clerk was not an admissible *medium of proof*, inasmuch as it appeared that it was no part of the clerk's duty to make such entry; (c) that the entry could not be *adduced* in evidence by means of the copy, because no good ground had been shown for dispensing with the production of the original.

There are some matters of which no proof need be given at all, because the court is bound to take judicial notice of them. There are other matters as to which the law makes certain presumptions which alter what would otherwise be the burden of proof in the first instance. It is convenient to group these together under the general title Burden of Proof, and to deal with that part of the law in its logical order before the others.

The order of the subject therefore will be as follows:—Burden of Proof, Relevant Facts, Media of Proof, Adduction of Evidence.

Finally, three considerations have to be borne in mind in connection with the rules and examples contained in this book.

The first is this, that the rules hereinafter contained are applied, speaking broadly, only to the facts in issue. It constantly happens in the course of a case that evidence is given of small matters which are not in dispute, merely for the purpose of introducing or completing the setting, so to speak, of some part of the story, and so rendering it more intelligible to the jury, just as in a speech it is necessary not to present the important facts in too bare a manner, if they are to be followed with ease by the listeners. It also frequently happens that a contest will arise as to some point connected in a merely remote and subordinate way with the issue. With regard both to the admissibility and the mode of proof of such matters as these, which are often spoken of as the fringe of the case, the judge has a wide discretion, and

in so far as they are admitted in evidence they are often proved in an informal manner.

The second consideration is this, that even with regard to the proof of the facts in issue some of the rules of evidence have lost something of their ancient sanctity, at any rate in civil cases. Since 1851, when the parties to a civil cause were first rendered competent witnesses in their own behalf and liable as such to cross-examination, the quantity of direct evidence available for the proof of the issues has been generally much ampler than was formerly the case; it seldom happens now that the scale of victory turns on the admissibility of some small piece of disputable evidence; and the relative importance of some of the rules by which the admissibility of evidence is determined is thereby somewhat diminished. Moreover, one of the causes to which this and other changes in the law are due, namely an increase in the confidence shown in the popular tribunal, has operated to discourage generally a too strict insistence on the letter of the law. With regard to civil cases the result is that while a party will be well advised to equip himself so as to comply with the requirements of the law of evidence, it will not always be politic for him to insist upon his strict rights as against his opponent. In the administration of the criminal law the change has been much less; in some cases, it is true, the defendant is now competent to give evidence, but the parties are not at liberty to dispense by admission or agreement with the strict proof of the facts in issue, and hence the practice in regard to evidence has not undergone much change.

The third consideration is this. It is a natural result of the change just referred to that far fewer decisions upon points of evidence are reported now than was formerly the case, and this is especially true of the civil court, where no new trial can be obtained by reason of the improper admission or rejection of evidence at the trial, unless in the opinion of the court some

substantial wrong or miscarriage has been occasioned within the meaning of Rule 6 of Order XXXIX. And hence in a work on evidence it is necessary, for the purpose of illustration, to resort for the most part to old cases. But while these are admirable for the purpose of illustrating the law, the reader ought, in judging of the weight of any decision, to observe the date when it was rendered, and to bear in mind the changes, both in the provisions of the law and in the spirit of its administration, to which we have adverted.

Part I.

BURDEN OF PROOF.



CHAPTER I.

JUDICIAL NOTICE.



- § 1.—*Law and Practice of the Courts.*
§ 2.—*Public Acts and Matters connected with the Government of the Country.*
§ 3.—*Matters of Fact of Common and Certain Knowledge.*



THERE are certain matters of which, although put in issue, no proof need be adduced, the judge being bound to recognize their existence. They consist partly of matters of law and partly of matters of fact, and are so various that it is difficult to summarize them; but it may be said that they consist for the most part of the law of England, the practice of the courts, public acts and matters connected with the government of the country, and such matters of fact as are of common and certain knowledge. The principle has also a large application in the case of public documents, as for instance in the recognition of official seals; but this part of the subject belongs to Part IV relating to the Adduction of Evidence.

Although the matters to which this principle applies require no proof, yet inasmuch as it imputes to the judge the knowledge of a vast number of details of which in fact his knowledge or memory may be imperfect, it is the practice for the parties to be prepared with the proper means of bringing to his mind the matters of which they desire

that he shall take notice. In the case of the law this is done by means of recognized editions of the statutes, reports by lawyers of decided cases, and text-books of accepted authority. On the same principle other books of credit, such as dictionaries, and histories of the kingdom (*a*), may be resorted to for the like purpose with regard to other matters within the rule.

§ 1.—Law and Practice of the Courts.

This comprises every branch of the unwritten law of England (*b*), and all general customs, such as the custom of banker's lien and other customs of the law merchant (*c*), or such as have an extended local application, as the customs of gavelkind and borough-english (*d*); but not those of less extended observance, known as particular, private, or local customs, such as the agricultural customs of particular counties or those of the city of London, which must be established by some form of evidence (*e*).

In like manner the judges take notice that the common law of Ireland is the same as that of England, and take notice of her laws as of those of England (*f*); but they do not take notice of the laws, usages or customs of Scotland or the colonies or foreign countries, which must accordingly be proved as matters of fact (*g*). By the common law judicial

(*a*) *Case of St. Katherine's Hospital* (1682) 1 Vent. 149, 151; *Brounker v. Atkyns* (1681) Skin. 11.

(*b*) *Sims v. Marryat* (1851) 17 Q. B. 281, 292.

(*c*) *Brandão v. Barnett* (1846) 3 C. B. 519, 530.

(*d*) *Clement v. Seudamore* (1703) 2 Ld. Raym. 1024—1026.

(*e*) The customs of the city are proved by the certificate of the Recorder of the city. For a list of customs so proved, see Phill. Ev. Vol. I. p. 461. Other customs are proved by the oral evidence of persons versed in them.

(*f*) *R. v. Nesbit* (1844) 2 D. & L. 529, 533; *Reynolds v. Fenton* (1846) 3 C. B. 187, 191.

(*g*) *Mostyn v. Fabrigas* (1774) 1 Cowp. 161, 174; *Sussex Peerage Case* (1844) 11 Cl. & F. 85, 115; *Brenan's Case* (1847) 10 Q. B. 492, 498; *Prowse v. E. and A. S.S. Co.* (1860) 13 Moo. P. C. 484, 503.

notice was also taken of all public acts of parliament (*h*), but private acts (unless for the purpose of proof declared to be public) had to be proved by means of a proper copy (*i*); but it is now enacted that every act passed since 1850 shall be a public act, and shall be judicially noticed as such unless the contrary is especially provided by the act (*k*). The matters which are judicially noticed by reason of their being regulated by statute law are very numerous, and some of them, such as the calendar (*l*), and weights and measures (*m*), are matters of almost daily reference.

Judicial notice was also taken at common law of the course of practice of the superior courts as being itself a part of the law (*n*). But this was not extended to the practice adopted by a newly established court, even though its jurisdiction, created by statute, was the subject of judicial notice (*o*); nor to the practice of inferior courts, which, in like manner, had to be proved by evidence (*p*). Now however the practice both of the superior courts and of the principal inferior courts is for the most part regulated by rules made in pursuance of statutory powers, and is as such judicially noticed.

§ 2.—Public Acts and Matters connected with the Government of the Country.

The subject-matters of this section are closely connected with those of the last. They comprise the accession and death of the sovereign (*q*); the names of the occupants from

(*h*) *R. v. Sutton* (1816) 4 M. & S. 532, 542.

(*i*) Viz., an examined or a Queen's printers' copy of the act. See B. N. P. 222 (a), and 8 & 9 Vict. c. 113, s. 3.

(*k*) 52 & 53 Vict. c. 63, s. 9, see pp. 179, 304.

(*l*) 24 Geo. 2, c. 23.

(*m*) 41 & 42 Vict. c. 49.

(*n*) *Lane's Case* (1596) 2 Rep. 16 b.

(*o*) *Van Sandau v. Turner* (1845) 6 Q. B. 773, 784, 785.

(*p*) *Lane's Case* (1596) 2 Rep. 16 b.

(*q*) *Holman v. Burrow* (1702) 2 Ld. Raym. 794; *Henry v. Cole*, *ibid.* 811.

time to time of the great offices of state (*r*); the appointments of the judges and other judicial officers (*s*); the commencements, prorogations and sessions of parliament (*t*), though not particular resolutions recorded on the journals of the two houses, of which evidence must be given (*u*); the division of the country into counties (*x*), though not the situation of particular places within the counties (*y*); and a large number of similar matters.

§ 3.—Matters of Fact of Common and Certain Knowledge.

When we pass from the domain of law to that of fact, it is more difficult to state with certainty the limits of the rule, but it does not seem to extend beyond matters of common and certain knowledge. Under this head fall some of the more obvious phenomena of nature, such as the course of the seasons, and the daily rising and setting of the sun, and such matters as the ordinary divisions of time and the meaning of the English language. But while judges have taken notice that in a particular year a given day of the month falls on a certain day of the week, and that the feast-days fall on particular dates, on the ground that these are matters determined by the calendar (*z*), they have refused to take judicial notice that the sun on a particular day of the year rises and sets at a particular hour, and have consequently refused to allow the allegation to be established by mere reference to

(*r*) *R. v. Jones* (1809) 2 Camp. 131; *Whaley v. Carlisle* (1866) 17 Ir. C. L. Rep. 792, 815.

(*s*) *Howell v. Wilkins* (1828) 7 B. & C. 783.

(*t*) *R. v. Wilde* (1682) 1 Lev. 296; *Birt v. Rothwell* (1698) 1 Ld. Raym. 210, 343.

(*u*) *Stockdale v. Hansard* (1837) 7 C. & P. 731, 736.

(*x*) 2 Inst. 557; *R. v. St. Maurice* (1851) 16 Q. B. 908.

(*y*) *Deybel's Case* (1821) 4 B. & A. 243.

(*z*) *R. v. Dyer* (1704) 6 Mod. 41; *Brough v. Perkins*, *ibid.* 81; see above, p. 18.

an almanac having no statutory authority (*a*). In like manner they have refused to take notice of the existence of independent foreign states, unless the same have already received recognition either in some act of parliament or in some official act of state (*b*). And the same principle has been applied to the existence of wars between two foreign nations, or between a foreign nation and this country (*c*).

Whether a fact should be judicially noticed or not must often be a question of degree. This is well illustrated by cases as to the period of gestation, the judge having in some cases taken judicial notice that a certain alleged period is impossible, and in others admitted evidence upon the matter (*d*).

(*a*) *Collier v. Nokes* (1849) 2 C. & K. 1012; *Tutton v. Darke* (1860) 5 H. & N. 647, 649, 650.

(*b*) *City of Berne v. Bank of England* (1804) 9 Ves. 347; *Irisarri v. Clement* (1826) 3 Bing. 432, 437, 438.

(*c*) *Dolder v. Huntingfield* (1805) 11 Ves. 283, 292; *R. v. De Berenger* (1814) 3 M. & S. 67, 69.

(*d*) *R. v. Luffe* (1807) 8 East, 193, 201, 207; *Bosvile v. Att.-Gen.* (1887) 12 P. D. 177.

CHAPTER II.

THE OBLIGATION AND THE RIGHT TO BEGIN.

§ 1.—*The Obligation to Begin.*

§ 2.—*The Right to Begin.*

§ 1.—The Obligation to Begin ^(a).

EVERY issue consists of an allegation of fact made by one party and denied by his opponent; and the general rule as to the onus of proof and the consequent obligation of beginning is this, that the proof of such fact lies on the party who alleges it, not on him who denies it: *ei incumbit probatio qui dicit, non qui negat*. And it is immaterial whether the allegation which is denied is couched in affirmative or in negative terms. Thus in an action by a landlord against a tenant for breaches of a covenant to repair, it is indifferent whether the plaintiff alleges in affirmative terms that the defendant permitted certain wants of repair and committed certain acts of dilapidation, or in negative terms that he did not execute the repairs and maintain the premises in the good state and condition prescribed by the covenant. And it is equally immaterial whether the defendant pleads a bare denial of the plaintiff's allegation or meets it with a specific affirmation of the execution of all the repairs which the plaintiff alleges he has not executed. In either case the plaintiff is the party who alleges the facts in issue, and

(a) The term more commonly used is Burden of Proof; but it has been preferred to apply the latter title to the whole subject-matter of this Part.

the defendant is the party who denies them, and the onus of proof and obligation to begin therefore rest on the plaintiff (*b*).

Apart from the presumptions to be mentioned in the next chapter, there is at common law no exception to this rule. And even in the case of statutes making it criminal to commit some act without some particular ground of justification, it has sometimes been held, in accordance with the general principle, that proof of the want of justification lay on the prosecution. Thus in the case of statutes making it criminal to kill deer, take fish, cut timber, or do certain other acts "without the consent of the owner," it was held that, as the absence of consent was an essential part of the definition of the crime, it lay on the prosecution to prove it (*c*). But in each case it will depend on the construction of the particular statute on whom the burden of proof lies in respect of any such condition. In a prosecution upon 5 Ann. ch. 14 s. 2, the effect of which statute together with 22 & 23 Car. 2 ch. 25 s. 3 was to make it penal for a carrier to be in possession of any game unless he were the owner of lands of a certain value or brought himself within the terms of several other conditions, it was held that the number of these, and the fact that they all related to matters specially within the knowledge of the party charged, were grounds for holding that, although the absence of them formed an essential part of the description of the offence, it lay on the defendant to prove the existence of any of them, not on the complainant to prove the absence of them all (*d*). In later times this view has been made the basis of express enactment, and in numerous cases the legislature has cast on the defendant the burden of proving the affirmative of a condition, notwith-

(*b*) *Smith v. Davies* (1836) 7 C. & P. 307; *Soward v. Leggatt*, *ibid.* 613.

(*c*) *R. v. Allen*, &c. (1826) 1 Moo. C. C. 151; *R. v. Hary* (1826) 2 C. & P. 458.

(*d*) *R. v. Turner* (1816) 5 M. & S. 206.

standing that the absence of it is an essential part of the definition of the crime. Thus there are many statutes which have made various acts criminal if done "without lawful excuse," such as being found by night in the possession of house-breaking implements (*e*), or in possession of instruments adapted and intended for making counterfeit coin (*f*); and there are others by which particular acts are declared to be criminal if done "with intent to defraud," such as the forging or falsely applying of marks to merchandise (*g*); and many others, defining other crimes with similar conditions or exceptions; in all of which it is expressly provided, contrary to the general principle, that the proof of the lawful excuse or authority, or the absence of fraudulent intent, as the case may be, shall be on the party charged, although by the terms in which the crime is defined they are expressly made elements of the offence.

Besides these particular enactments, more general ones have been passed with similar purpose. Thus by the Summary Jurisdiction Act, 1848 (*h*), it is enacted that, if the information or complaint shall negative any exemption, exception (*i*), proviso, or condition in the statute on which the same shall be framed, it shall not be necessary for the prosecutor or complainant in that behalf to prove such negative, but the defendant may prove the affirmative thereof in his defence if he would have advantage of the same. So by the Prevention of Crimes Act, 1871 (*k*), it is provided that any exception, exemption, proviso, excuse, or qualification, whether it does or does not accompany the description of the

(*e*) 24 & 25 Vict. c. 96, s. 58.

(*f*) 24 & 25 Vict. c. 99, ss. 14 and 24.

(*g*) 50 & 51 Vict. c. 28, s. 2.

(*h*) 11 & 12 Vict. c. 43, s. 14.

(*i*) As to what constitutes an exception, see *Davies v. Scrace* (1869) L. R. 4 C. P. 172; *Morgan v. Hedger* (1870) L. R. 5 C. P. 485; *Copley v. Burton*, *ibid.* 489.

(*k*) 34 & 35 Vict. c. 112, s. 17, subs. (3).

offence in the act, may be proved by the defendant, but need not be specified or negatived in the information or complaint, and if so specified or negatived no proof in relation to the matters so specified or negatived shall be required on the part of the informant or prosecutor or complainant.

§ 2.—The Right to Begin.

When the party on whom lies the obligation of beginning is prepared with adequate evidence, to begin is generally an advantage, since it enables him to impress his case first on the minds of the jury, and, if evidence be given on the other side, to have also the last word. From this point of view it is called the right to begin. The rules with regard to it are but a development, chiefly in connection with civil cases, of the general principles stated in the last section.

A defendant may meet a claim against him either by denying it, which is called a traverse, or by admitting it and pleading other matter which in law is an answer to it, called a confession and avoidance, or he may both traverse it and in the alternative plead matters which avoid the effect of it if true. If the defendant traverses any material part of the allegations in the plaintiff's claim, the plaintiff has the right to begin, and the rule applies not only where there is a denial of any part of the cause of action, but also where any consequent claim to damages is in issue, so that if these are unliquidated and are not admitted to the amount claimed, the plaintiff will be entitled to begin (*l*). If, on the other hand, it appears that they are mere matter of computation, or that they must be merely nominal, then the plaintiff cannot, merely because they are not admitted, claim the right to begin (*m*).

(*l*) *Mercer v. Hall* (1845) 5 Q. B. 447.

(*m*) *Fowler v. Coster* (1828) M. & M. 241; *Chapman v. Rawson* (1846) 8 Q. B. 673.

The right to begin was always determined by reference to the pleadings and not by any admissions the defendant might choose to make in court (*n*), save in the exceptional cases where the defendant was not entitled to plead. One of these cases was where the plaintiff claimed damages which were not essential to his cause of action; the rule of pleading was that the defendant could not plead to such claim of damages, because the plea would be no answer to the action (*o*). And hence it followed that whenever the right to begin turned on the denial or admission of damages which could not be pleaded to, the defendant was entitled to make the admission orally when the case was called on (*p*). Now however Rule 4 of Order XXI, which still dispenses a party from denying damages, provides that they shall be deemed to be put in issue in all cases unless expressly admitted, and hence it would appear that the defendant can no longer acquire the right to begin by admitting the damages at the hearing, since he may admit them expressly on the pleadings. Another case where the defendant could not plead was the action of ejectment, in which there were no pleadings. Here too the old rule as to gaining the right to begin by an admission in open court is abolished by the introduction of pleadings, including the right to make admissions on the record (*q*).

The judge has however the power to allow an amendment of the pleadings at the trial, and can by exercising it confer the right to begin on the party who then for the first time admits the facts pleaded by his opponent, wherever the nature of the case renders it desirable.

If the defendant confesses the whole of the allegations comprised in the plaintiff's claim, and seeks to avoid their

(*n*) *Pontifex v. Jolly* (1839) 9 C. & P. 202; *Price v. Seaward* (1841) C. & M. 23.

(*o*) Bullen & Leake, 3rd ed. p. 14.

(*p*) *Bonfield v. Smith* (1843) 2 M. & R. 519.

(*q*) See Order XXI r. 21.

effect by an affirmative case of his own, the right to begin belongs to him. Thus, where the plaintiff sued the defendant for trespassing on his land and destroying a dam thereon, and the defendant pleaded that he was entitled in respect of his mill to receive water from a certain waterecourse which flowed by the plaintiff's land, and that the plaintiff by his dam had wrongfully obstructed the flow of water to which the defendant was entitled, whereupon he had abated the same, it was held, upon the plaintiff admitting that he did not claim substantial damages, that the defendant was entitled to begin (*r*). So in an action of ejectment by heir-at-law against a defendant claiming under a will of the plaintiff's *propositus*, if the defendant has admitted that the latter died entitled to the property, and that the plaintiff is his heir-at-law, he has the right to begin (*s*). But where each party claims as heir-at-law, and the sole point in question is the defendant's legitimacy, the defendant's case is deemed a traverse rather than a confession and avoidance of the plaintiff's claim, and the plaintiff is entitled to begin (*t*). The same has been held, though with less reason, where the plaintiff claims under a will of the testator which the defendant does not deny in fact, but seeks to displace by proof of a subsequent codicil (*u*).

Whenever either party claims the right to begin, he thereby undertakes to offer evidence on that issue in respect of which he has claimed it (*x*); he cannot claim the right to begin in the sense of merely addressing the jury on the issue.

(*r*) *Chapman v. Rawson* (1846) 8 Q. B. 673.

(*s*) *Doe v. Burnes* (1831) 1 M. & Rob. 386. *Aliter*, where defendant does not admit that the deceased was entitled at the date of his death. *Doe v. Lewis* (1843) 1 C. & K. 122.

(*t*) *Doe v. Bray* (1828) M. & M. 166.

(*u*) *Doe v. Brayne* (1848) 5 C. B. 655.

(*x*) *R. v. Tooke* (1791) 25 St. Tr. 446, 447; *Smart v. Rayner* (1834) 6 C. & P. 721; *Oakeley v. Ooddcon* (1861) 2 F. & F. 656.

Where there are several issues, some of which are upon the plaintiff, and some upon the defendant, the plaintiff may begin by proving those only which are upon him, leaving it to the defendant to give evidence in support of those issues upon which he intends to rely; and the plaintiff may then give evidence in reply to rebut the facts which the defendant has adduced in support of his defence (*y*). If however the plaintiff in such a case gives in the first instance any evidence on the issues which lies on the defendant, he is bound to complete his whole case, and will not be entitled to call a portion of his evidence in reply (*z*).

(*y*) *Shaw v. Beck* (1853) 8 Ex. 392.

(*z*) *Browne v. Murray* (1825) Ry. & M. 254.

CHAPTER III.

PRESUMPTIONS.

THE term presumption denotes an inference of the existence of some fact which is in question drawn without evidence merely from some other fact already proved or assumed to exist. In our law, following the civil, presumptions are divided into three kinds: presumptions of fact or natural presumptions, rebuttable presumptions of law, and conclusive presumptions of law (*a*). Presumptions of fact consist of those inferences which have never hardened into rules of law, and as to which therefore the judge is not entitled to direct the jury that they are bound as a matter of law to draw them; in other words, they are common probabilities of fact which the jury may draw or not, as in their judgment the circumstances of the case may appear to warrant. Rebuttable presumptions of law, on the other hand, consist of inferences which, either from their frequent probability or on some ground of policy, have been adopted by the law, so that the judge is entitled and bound to direct the jury to draw them, subject to their being rebutted either by some evidence or by some more powerful presumption to the contrary. Conclusive presumptions of law are inferences which the law will not allow to be contradicted by any evidence whatever.

Conclusive presumptions of law hardly appear to belong to the law of evidence at all, since they do not differ from rules of substantive law, except that they are expressed in terms

(*a*) The civil terms were *presumptiones facti* or *naturæ*, *presumptiones juris*, and *presumptiones juris et de jure*.

belonging to the law of evidence. The following may suffice as examples of this class. By the common law it is conclusively presumed that an infant under the age of seven years cannot be guilty of felony, and that a boy under the age of fourteen is unable to commit the crime of rape (*b*). By 7 & 8 Vict. c. 45 s. 2 it is enacted with regard to certain dissenters' meeting-houses that when the instrument of trust does not fix the doctrine and worship to be observed, the actual usage observed for twenty-five years preceeding any suit with relation thereto shall be taken as conclusive evidence that the doctrines and worship used may be properly taught and observed at such meeting-houses.

Presumptions of fact are almost infinite in number, corresponding to the innumerable circumstances of human life, and their discussion would require a special treatise on circumstantial evidence (*c*). But while many of them are as special in their character as the circumstances in which they arise, others are of such common occurrence that they are among the common-places of the law courts, and tend to assume the character of fixed rules. Such is the presumption based on recent possession, according to which, in prosecutions for theft, when the prosecutor has proved that shortly after his goods were stolen they were found in the possession of the prisoner, a presumption is raised against the latter of having stolen or received them, according to the circumstances of the case, a presumption of fact which is considered sufficient to warrant his conviction, if he does not displace it by some explanation consistent with his innocence (*d*). It is convenient to refer to some presumptions of this kind in treating of rebuttable presumptions of law, as they run very closely into one another,

(*b*) 1 Hale, 27, 630; *R. v. Groombridge* (1836) 7 C. & P. 582.

(*c*) For a systematic analysis of circumstantial evidence, including presumptions of this class, see "An Essay on the Principles of Circumstantial Evidence, illustrated by numerous cases," by the late William Wills.

(*d*) *R. v. Langmead* (1864) L. & C. 427.

and it is often difficult to say whether a presumption is one of law or fact. For this reason some writers have suggested a further class, consisting of mixed presumptions of law and fact; but it seems more reasonable to consider that a presumption must be wholly either one of law or one of fact, and to admit that with regard to some it is not yet determined to which of the two classes they belong.

It is difficult to lay down any general rule as to the effect of a rebuttable presumption of law upon the burden of proof (*e*). In some cases, as that of the presumption of legitimacy (*f*), the burden of proof appears to be shifted absolutely away from the party in whose favour it operates. In other cases, as in that of the presumption that the holder of a bill of exchange is a holder in due course (*g*), it is only shifted conditionally, so that in an action by the holder the onus is cast on the defendant of giving sufficient evidence to rebut the *prima facie* presumption; when that has once been done the burden of proof shifts back to the holder in whose favour the presumption operated, and on whom, but for the presumption, it would from the beginning have lain, and remains thenceforth constant in point of law, so that it is now for him to make out his case in the ordinary way.

On the other hand, a presumption of fact, however strong, does not shift the burden of proof in law. In an action by the owner of a vessel against insurers for a total loss by perils of the sea, the defendants pleaded unseaworthiness at the commencement of the voyage. The vessel had had to put back eleven days after leaving port, and upon examination two or three weeks after her return was condemned as unseaworthy. The plaintiff's contention was that her condition when examined was due to the bad weather encountered during the voyage; the defendants' was that the bad weather

(*e*) See *Sutton v. Sadler* (1857) 3 C. B. N. S. 87.

(*f*) See below, p. 37.

(*g*) See below, p. 36.

was not of such a character as to compel the return of any sound vessel, and that she must have been unseaworthy at the commencement of the voyage. At the trial the judge directed the jury that though the burden of proving unseaworthiness was in the first instance on the defendants, yet the inability of the vessel to proceed at so early a period in her voyage raised such a presumption that the inability was due to causes existing before she started, that the burden of proof was consequently shifted. The jury found for the defendants, but the court ordered a new trial on the ground of misdirection, and held that although the inability to proceed might in the circumstances be cogent evidence of unseaworthiness, it had not the effect of shifting the burden of proof in law (*h*).

The following are some of the more important rebuttable presumptions, most of them of law, some of fact, and some of uncertain character.

The presumption of innocence, by which it is deemed that a person is innocent until proof to the contrary has been given, applies not in criminal cases alone, but also in all civil cases where an allegation of illegality is made (*i*). It seems doubtful whether this presumption is not merely another mode of stating, with regard to issues of a particular class, the general rule as to the burden of proof. And it is doubtful whether they ever conflict, except that it may perhaps sometimes happen in a civil case that a party alleging his innocence of some criminal act may be entitled to have the burden of proving his guilt cast on his opponent, instead of having himself to prove his innocence as the party alleging it.

An infant between the age of seven and fourteen is presumed incapable of criminal intent, and upon any indictment, therefore, it lies on the prosecution to satisfy the jury

(*h*) *Pickup v. Thames and Mersey Mar. Ins. Co., Ltd.* (1878) 3 Q. B. D. 594.

(*i*) *Williams v. East India Co.* (1802) 3 East, 192.

to the contrary (*k*). To this presumption the same observation applies as to the last.

A married woman who in the presence of her husband commits a theft, or receives stolen goods knowing them to be stolen, is presumed to have acted under his coercion (*l*).

With regard to things which in the ordinary course of events are likely to endure for some period of time, it is often inferred from their proved existence at one point of time that they have continued down to some later moment. This presumption has been applied to a person's tenure of office (*m*), and to the derangement of a man's mental faculties (*n*). It is however a presumption of fact, the strength of which must depend on the natural duration of the subject in question, the period of time elapsed, and the other circumstances of the case. It would seem to assume the character of a presumption of law only in respect of such a subject as a custom, which may endure for as long a period in the future as it has in the past (*o*).

The most important subject to which this presumption of fact is applied is the duration of human life (*p*). In the absence of any ground for inferring the contrary, the life of a person proved to exist at a particular moment is presumed to continue for some time (*q*); but the strength of any presumption that a person's life has continued for any particular period must always depend on his age, health, and the other circumstances of his life (*r*). And of course, whether a party

(*k*) Steph. Dig. Cr. Law, Art. 26.

(*l*) Steph. Dig. Cr. Law, Art. 30.

(*m*) *Steward v. Dunn* (1844) 12 M. & W. 655.

(*n*) *Att.-Gen. v. Parnter* (1792) 3 Bro. C. C. 441; *White v. Wilson* (1806) 13 Ves. 187.

(*o*) *Scales v. Key* (1840) 11 A. & E. 819.

(*p*) See observations upon it by Bowen, J. in *Dalton v. Angus* (1881) 6 App. Cas. 740, 781.

(*q*) *Wilson v. Hodges* (1802) 2 East, 312; *Nepean v. Doe* (1837) 2 M. & W. 895, 910, 913.

(*r*) *R. v. Harborne* (1835) 2 A. & E. 540, 544; *R. v. Lumley* (1869) L. R. 1 C. C. 196.

has to prove the continuance of a person's life up to a certain date or his death before a certain date, in either case the question, being one of fact, must be determined in the same manner. The only presumptions of law made in this matter are the following. By the common law, if a person goes abroad and is not heard of for seven years by those who would be likely to hear of him if living, there is a presumption of law that he is dead; but, although the fact of death is thus presumed, there is still no presumption that the death occurred at any particular point or within any particular portion of those seven years (*s*). This presumption of law does not however appear to extend to the case where a person is merely lost sight of for seven years, but there is nothing to indicate that he went abroad; in such case any inference of his death must be one not of law but of fact, although in practice the period of seven years is often adopted by analogy to the rule of law (*t*). In certain other cases similar provisions, but extending to absence within the realm, have been made by statute. By an act of Car. 2 (*u*) it is provided that where a *cestui que vie* shall remain beyond the seas, or elsewhere absent himself in this realm by the space of seven years together, and no sufficient and evident proof be made of the life of such person, in any action commenced for the recovery of such tenements by the lessor or reversioner, such person shall be accounted as naturally dead, and the judge at the trial shall direct the jury to give their verdict accordingly (*x*). Again, by sect. 57 of the statute 24 & 25 Vict. c. 100 (*y*), which prescribes the punishment

(*s*) *Doe v. Nepean* (1833) 5 B. & Ad. 86, 94; *Nepean v. Doe* (1837) 2 Sm. L. C.; 2 M. & W. 910, 912; *Re Phené's Trust* (1869) 5 Ch. 139.

(*t*) See the general expressions contained in *Doe v. Jesson* (1805) 6 East, 80, 85; *Doe v. Deakin* (1821) 4 B. & A. 433.

(*u*) 18 & 19 Car. 2, c. 11, s. 1.

(*x*) See, on the construction of this section, *Doe v. Andrews* (1850) 15 Q. B. 756.

(*y*) The previous enactments were 1 Jac. 1, c. 11, s. 2; and 9 Geo. 4, c. 31, s. 22.

for the crime of bigamy, it is provided that nothing therein contained shall extend to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to be living within that time. The effect of this section is not only to make guilty knowledge on the part of the prisoner an essential element of the offence, but also to throw on the prosecution, in the event specified, the burden of proving the existence of guilty knowledge (*z*). The effect of the section therefore is this: under the proviso it is only necessary for, say, a male defendant in the first instance to prove that his wife has been continually absent for seven years; for then it will be no answer for the prosecution to prove that he had no reasonable grounds for believing her to be dead, unless they can further prove that he actually knew her to be living. When however the absence has been for less than seven years, the defendant must prove facts from which the jury may reasonably infer that he honestly and on reasonable grounds believed his first wife to be dead before he married again (*a*).

There is a presumption of law that any person who acts in a public office was duly appointed or authorized to do so (*b*). Instances of public offices to which this rule has been held applicable are those of churchwardens and overseers (*c*), attorneys and solicitors, police officers, justices of the peace, constables, incumbents (*d*), deputy county court judges (*e*), vestry clerks (*f*), and an official principal's surrogate (*g*). The

(*z*) *R. v. Curgerwen* (1865) L. R. 1 C. C. 1.

(*a*) *R. v. Tolson* (1889) 23 Q. B. D. 168, 183.

(*b*) *McGahey v. Alston* (1836) 2 M. & W. 206; *R. v. Roberts* (1878) 14 Cox, 101.

(*c*) *Doe v. Barnes* (1846) 8 Q. B. 1037.

(*d*) *Berryman v. Wise* (1791) 4 T. R. 366.

(*e*) *R. v. Roberts* (1878) 14 Cox, 101.

(*f*) *McGahey v. Alston* (1836) 2 M. & W. 206.

(*g*) *R. v. Ferelst* (1813) 3 Camp. 432.

presumption holds good in proceedings of every description, civil and criminal. The same principle has been adopted in certain cases by express provisions of the statute law, as in the case of public officers employed in the prevention of smuggling (*h*). But the presumption has no application to private offices, such, for example, as that of a tithe collector; the existence of these, and the due appointment of their holders, are both matters of fact (*i*). Familiar examples of this class are executors and administrators, and trustees in bankruptcy. With regard to public offices there is a further presumption that the duties of those who fill them are performed with regularity: *omnia esse rite acta*. Thus, on an issue as to a settlement, the question was whether a parish certificate, signed some sixty years previously by one churchwarden and one overseer, was valid. By 8 & 9 Will. 3 c. 30 s. 1 such certificate must be signed by a majority of the churchwardens and overseers for the time being, and by 43 Eliz. c. 2 s. 1 there must be two overseers appointed. By local custom there may be one churchwarden only. It was held that it was to be presumed that there was a custom in the parish of appointing one churchwarden only, and that there had been a regular appointment of two overseers and a subsequent death of one of them (*k*). The court regarded the presumption in this case as one of law.

Another important presumption is this, that rights or alleged rights which have been long enjoyed without interruption are deemed to have had a legal origin. In consequence of the difficulties which attended the proof of claims resting on prescription at common law, the courts adopted the principle of presuming immemorial possession from a

(*h*) 39 & 40 Vict. c. 36, s. 261.

(*i*) *Short v. Lee* (1821) 2 J. & W. 464, 468; *Pasmore v. Bousfield* (1816) 1 St. 296.

(*k*) *R. v. Catesby* (1824) 2 B. & C. 814.

proved possession of twenty years (*l*). This presumption however being liable to be defeated by proof of a commencement of possession prior to the twenty years but within legal memory, a further presumption was adopted by which from the twenty years' possession a lost grant within legal memory was presumed. The difficulties which were found in applying this doctrine, arising in part from differences of judicial opinion as to its true extent, in part from the unwillingness of juries to find in favour of a pure fiction, led to the passing of the Prescription Act (*m*). The doctrine of lost grant was not however thereby abolished, but in cases where neither the statute nor the common law doctrine of prescription are applicable, it is still resorted to, notwithstanding the criticisms that have been urged against it (*n*). The same presumption of legality, but apparently without any definite minimum limit of time, is applied in other cases. Thus, where it was necessary to the validity of an award for the closure of a public way in pursuance of statutory powers that it should be made subject to the order and concurrence of magistrates, and the way had been in fact closed for twenty-seven years after the date of the award, the court presumed as a matter of fact that the award had been duly made subject to the order and concurrence required (*o*).

The Bills of Exchange Act, 1882, enacts that every holder of a bill is *prima facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or

(*l*) *R. v. Jolliffe* (1823) 2 B. & C. 54; *Jenkins v. Harvey* (1835) 1 C. M. & R. 877.

(*m*) 2 & 3 Will. 4, c. 71. See *Bright v. Walker* (1834) 1 C. M. & R. 211, 217; *Mounsey v. Ismay*, 3 H. & C. 486, 496.

(*n*) *Dalton v. Angus* (1881) 6 App. Ca. at p. 811; *Halliday v. Phillips* (1889) 23 Q. B. D. 48; *Bass v. Gregory* (1890) 25 Q. B. D. 481. See *Bryant v. Lefever* (1879) 4 C. P. D. 172, for the limits of the doctrine.

(*o*) *Williams v. Eytton* (1858) 27 L. J. Ex. 176; 28 L. J. Ex. 146.

illegality, the burden of proof is shifted, unless and until the holder proves that subsequent to the alleged fraud or illegality value has in good faith been given for the bill (*p*). The same rule applies *mutatis mutandis* to promissory notes (*q*). The provision appears to be substantially an enactment of presumptions which were established at common law. It had been held, for instance, that proof by the defendant that the bill sued on was given for an illegal consideration (*r*), or was negotiated fraudulently by an intermediate holder (*s*), or was stolen (*t*), threw on the plaintiff the burden of proving that he gave value for the bill. It was doubted whether it also threw on him the burden of proving his own *bona fides* (*u*), but this point is now settled by the section. On the other hand it was held at common law that proof of mere want of consideration, as in the case of an accommodation bill (*x*), or a bill given in payment of a wager (*y*), did not throw on the plaintiff the burden of proving value; and in this respect the statute has made no difference.

The presumption of legitimacy is this, that a child born of a married woman is deemed to be legitimate, that is, to have been procreated by her husband, and it throws on any person who is interested in making out the illegitimacy the whole burden of proving it (*z*). In order however to prove illegitimacy it is no longer necessary to prove impossibility of access, but only that the husband was not in fact the

(*p*) 45 & 46 Vict. c. 61, s. 30.

(*q*) Sect. 89.

(*r*) *Bailey v. Bidwell* (1844) 13 M. & W. 73.

(*s*) *Smith v. Braine* (1851) 16 Q. B. 244.

(*t*) *Raphael v. Bank of England* (1855) 17 C. B. 161.

(*u*) *Jones v. Gordon* (1877) 2 App. Cas. 616, 627, 628.

(*x*) *Mills v. Barber* (1836) 1 M. & W. 425.

(*y*) *Fitch v. Jones* (1855) 5 E. & B. 238.

(*z*) *Morris v. Davies* (1836) 5 Cl. & F. 163; *Atchley v. Sprigg* (1864) 33 L. J. Ch. 345.

father of the child (*a*). This must almost always be established by circumstantial evidence, in consequence of the rule which excludes the husband and wife from giving any evidence as to the legitimacy or illegitimacy of the wife's offspring (*b*), although in some cases statements made by her (*c*), and by her paramour (*d*), have been admitted. There is a further presumption in connection with this subject, namely, that when husband and wife are shown to have slept together, they are presumed to have had sexual intercourse; but this presumption, like the former one, can be rebutted by clear circumstantial proof that the husband was not the father of the child (*e*).

(*a*) *Bosville v. Att.-Gen.* (1887) 12 P. D. 177.

(*b*) *Haices v. Dracger* (1883) 23 Ch. D. 173.

(*c*) *Aylesford Peccage Case* (1885) 11 App. Ca. 1.

(*d*) *Burnaby v. Baillie* (1889) 42 Ch. D. 282.

(*e*) *Bosville v. Att.-Gen.* (1887) 12 P. D. 177, 179. In connection with the whole of this paragraph, cp. below pp. 202—204.

Part II.

THE RELEVANT FACTS.



CHAPTER I.

THE GENERAL RULE.



§ 1.— <i>Statement of the Rule.</i>	§ 4.— <i>Similar Facts when Connected.</i>
§ 2.— <i>Possession.</i>	§ 5.— <i>Identification and Explanation.</i>
§ 3.— <i>Circumstantial Evidence.</i>	



§ 1.—Statement of the Rule.

THE general rule is that a party may prove all facts that are relevant to the facts in issue and no others (*a*). The facts in issue are those propositions of fact which by their pleadings, whether written or oral, the one party alleges and the other denies. It is not easy to define in a single sentence the meaning of relevancy, but the main conception of the term is this, that the relevant facts consist of those facts which form the parts and details of the facts in issue, and such further facts as may be necessary to identify or explain them. The distinction between the facts in issue and facts which are relevant to the issue is displayed in two rules. It is a rule of pleading, where by the practice of the court the facts in issue must be reduced into written forms, that evidence shall not be pleaded. And there is a converse rule

(*a*) *Wright v. Doe* (1837) 7 A. & E. 313, 384.

in the adduction of evidence, that a witness may not be asked the question in issue, since that is for the jury; he may only be asked as to the details of fact from which the jury are to draw the general conclusion. It is not possible to define with exact precision the degree of generality permissible in pleadings (*b*), nor the degree of particularity which must be observed in presenting the items of evidence, since they vary to some extent according to the circumstances of the case; but this qualification does not affect the validity of this broad distinction between the facts in issue and the relevant facts.

In some cases it happens that the fact in issue is of so simple a character that the details which go to make it up are very few, while in others, where it is more complex, they are very numerous. If, for instance, the fact in issue be the writing and publication of a libel contained in a letter, the relevant facts may be merely that the letter is in the handwriting of the defendant, that it was received and read by the particular person to whom it is alleged to have been published, and that it had been dispatched to him by the defendant. But if the fact in issue be whether a business sold with a representation as to the amount of its turnover was or was not of the value represented, the relevant facts may consist of a very large number of details ranging over a considerable period of time.

§ 2.—Possession.

The general rule is well illustrated by cases of possession, and especially by the possession of real rights, whether incorporeal, as an ancient watercourse or a right of common, or

(*b*) See as to this, Order XIX rr. 4, 6, 15, 20, 22—24; *Blake v. Albion Life Ass. Soc.* (1876) 45 L. J. C. P. 667; *Phillips v. Phillips* (1878) 4 Q. B. D. 127.

corporeal, as a field or a road strip. In such cases every act of enjoyment or possession is a relevant fact, since the right claimed is constituted by an indefinite number of acts of user exercised *animo domini*. But inasmuch as such acts are more or less discontinuous in their character—and in the case of ancient rights the evidence of them is by lapse of time rendered even more so—the question for the jury is whether the acts proved are so numerous and so connected that the right of possession may be inferred from them. If they are so frequent and of such a character as to indicate that they were the exercise of one continuous open claim at all times when it would be natural for the person claiming it to exercise it, the jury will ordinarily infer the general right, inasmuch as the mere discontinuity of the evidence is not in itself any ground of suspicion. The acts of enjoyment from which the ownership of real property may be inferred are very various, as, for instance, the cutting of timber (*c*), the repairing of fences or banks (*d*), the perambulation of boundaries of a manor or parish (*e*), and the granting to others of licences (*f*) or leases (*g*) under which possession is taken and held; for all these acts are fractions of that sum total of enjoyment which characterises *dominium*. And successful claims to exercise possessory rights are equally relevant facts when they are exercised through the intervention either of customary courts or of the courts of the land. Thus, where the issue was as to the existence of a custom within a manor for the lord to have a heriot on the death of each of his freehold tenants, presentments of the deaths of manorial tenants, and of the consequent payment of heriots to the lord, were admitted in

(*c*) *Stanley v. White* (1811) 14 East, 332.

(*d*) *Jones v. Williams* (1837) 2 M. & W. 326.

(*e*) *Weeks v. Sparke* (1813) 1 M. & S. 679, 689; *Woolway v. Rowe* (1834) 1 A. & E. 114; and see below, pp. 172, 174.

(*f*) *Rogers v. Allen* (1808) 1 Camp. 309.

(*g*) *Bristow v. Cormican* (1878) 3 App. Ca. 641.

evidence to prove the custom (*h*). So, on an issue as to the terms on which customary tenants within a manor were entitled to obtain renewals of leases, presentments of such renewals and of the fines paid thereon were admitted as relevant (*i*). In like manner it has been frequently held that verdicts and judgments in actions of trespass to hereditaments (*k*), convictions for the non-repair of public ways (*l*), and verdicts and judgments for the recovery of prescriptive tolls (*m*), are admissible as relevant facts when the right to the land, the way, or the toll respectively is in question. Adjudications of this kind are referred to again in the chapter on Reputation in Part III (*n*).

§ 3.—Circumstantial Evidence.

Relevant facts are sometimes divided somewhat loosely into two classes, direct evidence and circumstantial, according as the relation of the relevant facts to the facts in issue is more or less proximate or remote. When every part of a fact in issue is presented to the cognizance of the court by means of the statements of those who witnessed it, the evidence is said to be direct. The only question for the jury is whether the statements are accurate. If they are, no further inference has to be drawn, for the transaction has been presented to the court in all its completeness just as it happened. If, on the other hand, there is no evidence available of any person who witnessed the fact in issue, it may still be possible to prove a number of facts which though not

(*h*) *Damerell v. Protheroe* (1847) 10 Q. B. 20.

(*i*) *Freeman v. Phillips* (1816) 4 M. & S. 486.

(*k*) *Rogers v. Allen* (1808) 1 Camp. 309; *Neill v. Devonshire* (1882) 8 App. Ca. 135.

(*l*) *R. v. Brightside Bierlow* (1849) 13 Q. B. 933.

(*m*) *City of London v. Clarke* (1691) Carth. 181; *Laybourn v. Crisp* (1838) 4 M. & W. 320.

(*n*) See pp. 176, 177.

exactly constituting the fact in issue, are so closely connected with it that it is reasonable to infer from their existence the existence of the fact in issue. Such facts are called circumstantial evidence, as if they formed not so much a part of the central fact in issue as the surrounding fringe and incidents of it (*o*). Circumstantial evidence is resorted to either by reason of the lack of direct evidence to prove the facts in issue or some part of them, or to supplement and corroborate direct evidence when doubt is attempted to be cast upon it.

The want of direct evidence is often illustrated by criminal cases. Thus a man is found slain, suspicion attaches to one of his neighbours, and the suspected man is put on his trial for murder. No one beheld the deed, save the man who is now dead, and the man, whoever he was, who slew him. The deceased made no statement about it to any living person, and the prisoner has disclosed nothing. Here the act of murder, which is the fact in issue, cannot be proved by direct evidence; it must be proved, if at all, by inference from other facts. The prosecution will be entitled to prove as relevant all facts which may tend to show that the prisoner had a motive for the murder, that he expressed an intention to commit it, that he made preparation, and that he had opportunity (*p*); and, conversely, any facts which tend to disprove any of these circumstances, or to explain them in prisoner's favour, will in like manner be relevant.

The other ground for resorting to circumstantial evidence is illustrated daily in the courts. It is brought into full play

(*o*) The term Direct Evidence is also used, in opposition to the term Hearsay, to denote the evidence of an eye-witness delivered by himself on oath in Court, as opposed to evidence of his declarations tendered as proof after his death, and other forms of Hearsay. See pp. 94—99, below. These two senses of the term should be carefully distinguished.

(*p*) The circumstances of his subsequent conduct, tending to show a sense of guilt, are also admissible, but belong to the head of admissions. See pp. 107, 108. Circumstantial relevant facts and circumstantial admissions, commonly termed admissions by conduct, together make up the great bulk of what is called circumstantial evidence.

when witnesses are called on both sides, and each party throws doubt upon material portions of the evidence adduced by his opponent. In such case the minor circumstances of the transaction in question may become just as relevant as in those cases where there is hardly any direct evidence at all as to the facts in issue. Thus, in an action for money lent, where the defence was a denial of the loan, the defendant tendered evidence as to the pecuniary circumstances of the plaintiff during the seven years preceding the date of the alleged loan. He proved that the plaintiff neither had any property of his own, nor had taken any benefit under his father's will, that he had been a labourer at one shilling a day, and that his means of livelihood were very precarious; and it was held by the full court that the evidence had been rightly admitted as circumstantial evidence in support of the negative of the issue (q).

In one class of cases circumstantial evidence must from the nature of the case be given. They are those where the state of mind of a particular person is in issue, as, for instance, where it is alleged that a party did a particular act with a fraudulent purpose, or where, to establish the commission of a particular crime, it is necessary to prove that the prisoner, when he committed the physical act, did so with some particular guilty intent. In these cases no one save the party charged can, strictly speaking, give direct evidence of his mental state; and, when he denies the charge, it has to be proved by inference from his conduct (r).

Circumstantial evidence is not confined to the proof of a fact in issue. Generally, any fact which is relevant to the issue may be proved by circumstantial evidence. But the series of subordinate inquiries thus logically admissible is subject in practice to reasonable limitations. The line is

(q) *Dowling v. Dowling* (1860) 10 Ir. C. L. R. 236.

(r) Cp. what is said at pp. 52—55, and pp. 142—152.

drawn where the extent of the inquiry becomes wholly disproportionate to the importance of the fact to be proved (*s*).

§ 4.—Similar Facts when Connected.

Whether the evidence be direct or circumstantial, it must be confined to the facts in issue. To admit evidence of other transactions, however close the analogy or resemblance between them and that in issue, would be a violation of the general principle. Thus, where the question was as to the existence of a custom in a particular manor, it was held that evidence of a like custom existing in an adjoining manor within the same parish and leet was not admissible, even though the latter manor were shown to be a subinfeudation of the former, there being no evidence that the separation took place after the time of legal memory (*t*). Where however the particular facts in issue form in some sense a part of some larger whole, of which all the parts possess for the purpose in hand a similar character, so that what is true of one part will be true of the others, the facts in issue may be supported by evidence of the similar facts thus connected with them. Thus, if a right be claimed in respect of a particular piece of land and it can be shown that such piece is but a portion of some larger area possessing a common character, facts relating to other parts of that area may be relevant to the issue as to the smaller portion. A leading case on this point is *Jones v. Williams* (*u*). There the plaintiff sued the defendant for trespass to the bed of a stream which divided their respective farms. The plaintiff claimed the entire bed. The defence was that the defendant was the owner of the stream *usque ad medium filum* from his side,

(*s*) The whole subject of circumstantial evidence is analysed and illustrated in the work referred to above, p. 29, note (*c*).

(*t*) *Anglesey v. Hatherton* (1842) 10 M. & W. 218.

(*u*) (1837) 2 M. & W. 326.

which, if true, would have entitled him to commit the acts complained of. The plaintiff's farm extended along the stream not only for the whole length of the defendant's farm, but also beyond it and opposite to another farm adjoining the defendant's. The plaintiff tendered in evidence repairs and other acts of ownership exercised upon the whole bed and the banks of the stream alongside the farm beyond the defendant's, and upon a fence which was a continuation of the fence which divided the defendant's farm from the stream. The evidence was objected to and rejected, and a verdict was found in favour of the defendant. But on an application by the plaintiff for a new trial, the court held that it should have been admitted. Parke, B., said :—

I think the evidence offered of acts in another part of one continuous hedge, and in the whole bed of the river, adjoining the plaintiff's land, were admissible in evidence, on the ground that they are such acts as might reasonably lead to the inference that the entire hedge and bed of the river, and consequently the part in dispute, belonged to the plaintiff. Ownership may be proved by proof of possession, and that can be shown only by acts of enjoyment of the land itself; but it is impossible, in the nature of things, to confine the evidence to the very precise spot on which the alleged trespass may have been committed; evidence may be given of acts done on other parts, provided there is such a common character of locality between those parts and the spot in question as would raise a reasonable inference in the minds of the jury that the place in dispute belonged to the plaintiff if the other parts did. In ordinary cases, to prove his title to a close, the claimant may give in evidence acts of ownership in any part of the same inclosure; for the ownership of one part causes a reasonable inference that the other belongs to the same person; though it by no means follows as a necessary consequence; for different persons may have balks of land in the same enclosure; but this is a fact to be submitted to the jury. So I apprehend the same rule is applicable to a wood which is not inclosed by any fence; if you prove the cutting of timber in one part, I take that to be evidence to go to a jury to prove a right in the whole wood, although there be no fence or distinct boundary surrounding the whole; and the case of *Stanley v. White* (x), I conceive, is to be explained on this principle: there was a continuous belt

(x) (1811) 14 East, 332.

of trees, and acts of ownership on one part were held to be admissible to prove that the plaintiff was the owner of another part on which the trespass was committed. So I should apply the same reasoning to a continuous hedge, though no doubt the defendant might rebut the inference that the whole belonged to the same person by showing acts of ownership on his part along the same fence.

In another case the question was whether certain strips of land along the roadside belonged as waste land to the owner of the adjoining enclosure, or were the property of the lord of the manor. The lord, who was the defendant in the action, tendered evidence of acts of ownership exercised by him from time to time on several similar strips of land in various parts of the manor. Three of these strips lay alongside a continuation of the road on which lay the strip in question, about two miles distant from the *locus in quo*; but no evidence was given to show in what part of the manor the remaining strips were situate. It was held that the three strips had sufficient community of locality with the strip in question to render the evidence with regard to them admissible; but as to the others, the locality of which was not proved, it was held that no evidence was admissible, since the mere fact that they were situate within the same manor created no reasonable probability that the lord had retained and dealt with them in the same way as with the strip in question (*y*).

§ 5.—Identification and Explanation.

Facts which are not otherwise relevant to the issue are admissible when they can be shown to be for the particular purpose in hand identical with some relevant fact. Thus, where the issue was as to the line of boundary of a particular estate, evidence having been given that the estate was continuous with a certain hamlet, evidence was admitted to prove the boundary of the hamlet (*z*). So, where the date

(*y*) *Doe v. Kemp* (1835) 2 Bing. N. C. 102.

(*z*) *Thomas v. Jenkins* (1837) 6 A. & E. 525.

of a particular event was in question, and a witness deposed that, although he could not state the date, he knew that it was contemporaneous with a marriage between A and B, evidence was admitted to show on what date A and B were married (*a*).

It is on a similar principle that documents not otherwise relevant to the issue are admissible for the purpose of comparison of handwriting when proved to be in the handwriting of the party whose signature is in question (*b*).

In like manner any fact which is necessary in order to explain any fact in issue or any relevant fact, is itself relevant; and it not infrequently happens that for this purpose a large number of facts become relevant, where an issue is raised as to the character or quality of some particular person or thing.

This head of evidence may be said to bear some analogy to that which is admitted for the purpose of interpreting documents by clearing up a latent ambiguity (*c*).

(*a*) *Doe v. Barnes* (1834) 1 M. & R. 386.

(*b*) *Birch v. Ridgway* (1858) 1 F. & F. 270.

(*c*) See pp. 70—73.

CHAPTER II.

CONDUCT AND CHARACTER.

§ 1.—*Conduct on other Occasions.*

§ 2.—*Character.*

(i) *Evidence for the Prisoner of his own Good Character.*

(ii) *Evidence for the Prisoner, on an Indictment for Rape, &c., of the Immoral Character of the Prosecutrix.*

IN the last chapter it was shown that facts are not deemed relevant by reason merely of their similarity to those in issue, unless some specific connection can be shown to exist between them. How is this principle applied in the case of human actions? When the issue is whether a person has or has not done a particular act, is it admissible to establish that he has a disposition to do acts of that kind, by proving either that on some other occasion he has done similar acts, or that he has the reputation of being a man who does them? On the one hand, a man's character does ordinarily present a certain degree of uniformity; on the other, it is common enough for a man who has done an act of a particular kind on one, or it may be more than one, occasion, to abstain from further repeating such acts, so that his past conduct and character are an uncertain guide. The principle adopted by our law is that a person's conduct on other occasions than that in question, and his character (by which is here meant his reputation), are not, save in certain exceptional cases, relevant to the issue whether he has done a particular act on a particular occasion.

§ 1.—Conduct on other Occasions.

A leading case on this point is *Hollingham v. Head* (a). It was an action for the price of guano sold and delivered by the plaintiff to the defendant; and the defence was that the plaintiff had sold the guano on the terms that it was not to be paid for unless equal to Peruvian guano, which the defendant alleged it was not. The defendant, in order to prove that the plaintiff had contracted with him on these terms, tendered evidence to show that the plaintiff had sold other parcels of the same guano to other persons on that particular condition. This evidence was rejected, and the court upheld the rejection of the evidence. Willes, J., said (b):—

It is not easy in all cases to draw the line, and to define with accuracy where probability ceases and speculation begins; but we are bound to lay down the rule to the best of our ability. No doubt, the rule as to confining the evidence to that which is relevant and pertinent to the issue is one of great importance, not only as regards the particular case, but also with reference to saving the time of the court, and preventing the minds of the jury from being drawn away from the real point they have to decide. . . . Now, it appears to me that the evidence proposed to be given in this case, if admitted, would not have shown that it was more probable that the contract was subject to the condition insisted upon by the defendant. The question may be put thus—Does the fact of a person having once or many times in his life done a particular act in a particular way make it more probable that he has done the same thing in the same way upon another and different occasion? To admit such speculative evidence would, I think, be fraught with great danger. . . . If such evidence were held admissible it would be difficult to say that the defendant might not in any case, where the question was, whether or not there had been a sale of goods on credit, call witnesses to prove that the plaintiff had dealt with other persons upon a certain credit; or, in an action for an assault, that the plaintiff might not give evidence of former assaults committed by the defendant upon other persons, or upon other persons of a particular class, for the purpose of showing that he was a quarrelsome individual, and therefore that it was highly probable that the particular charge of assault was well founded. The extent to which

(a) (1858) 4 C. B. N. S. 388.

(b) *Ibid.* p. 391.

this sort of thing might be carried is inconceivable^(c). . . . To obviate the prejudice, the injustice, and the waste of time to which the admission of such evidence would lead, and bearing in mind the extent to which it might be carried, and that litigants are mortal, it is necessary not only to adhere to the rule, but to lay it down strictly. I think, therefore, the fact that the plaintiff had entered into contracts of a particular kind with other persons on other occasions could not properly be admitted in evidence, where no custom of trade to make such contracts, and no connection between such and the one in question, was shown to exist.

So in a penal action for usury alleged to have been committed in a contract between the defendant and the Marquis de Chambonas, the plaintiff called the Marquis to prove the usury, namely, a loan by the defendant to the witness at 120 per cent. per annum. The defence was that it was no loan, but a partnership transaction; and the defendant, in order to lay a foundation for giving evidence of other partnership transactions in which he alleged the Marquis had been engaged, and from which the character of the transaction in question might be inferred, proposed to cross-examine the Marquis as to them. The evidence, however, was disallowed as irrelevant, and its rejection was upheld by the court. It was held that it could only have been relevant had the witness first admitted that such other contracts were made in similar terms to that with the defendant ^(d). So in an action against a married woman for goods sold and delivered, where the question was whether the defendant had falsely represented to the plaintiff that she was a *feme sole*, it was held by Parke, B., that the plaintiff could not give evidence of the defendant having made such representations to other tradesmen, unless they were so made as to come to the plaintiff's knowledge ^(e).

Again, where the question was whether the defendant's alleged acceptance of a bill of exchange was, as he contended,

^(c) For what follows, see the report in 27 L. J. C. P. p. 242.

^(d) *Spenceley v. De Willott* (1806) 7 East, 108.

^(e) *Bardon v. Keverberg* (1836) 2 M. & W. 61, 63, 64.

forged, it was held that he could not give in evidence that the plaintiff had in his possession, and had circulated, a number of other bills with forged acceptances of the defendant, unless it was first shown that this bill had formed part of the collection (*f*). And in an action for assault to the plaintiff's wife, where the defendant on cross-examination denied that he had assaulted other women in a like manner, it was held that this evidence was not relevant to the issue, so as to entitle the defendant to call witnesses to rebut, or the plaintiff to call witnesses to substantiate, the imputations thus made (*g*). On a prosecution for the theft of a shilling, the property of one Spencer, the prosecutor tendered evidence to show that when the shilling, which had been previously marked, was found on the prisoner, he was asked by the constable who arrested him if he had any more money of Mr. Spencer's about him, and that the prisoner thereupon produced some half-crowns, and made a statement in regard to them. There was apparently nothing to show that the shilling and half-crowns were taken at the same time. The evidence was objected to as tending to prove a distinct felony from that charged, and the objection was upheld (*h*). Where however several takings form part of one entire transaction, they may all be proved, although they may not all form the subject of indictment (*i*). And the same principle is applied to other crimes, as arson (*k*), and burglary (*l*), as well as to civil cases (*m*).

Intention.—There is however one important exception to the general rule against evidence of conduct on other occasions.

(*f*) *Griffiths v. Payne* (1839) 11 A. & E. 131; cp. *Viney v. Barss* (1795) 1 Esp. 293.

(*g*) *Tolman v. Johnstone* (1860) 2 F. & F. 66.

(*h*) *R. v. Butler* (1846) 2 C. & K. 221.

(*i*) *R. v. Ellis* (1826) 6 B. & C. 145; *R. v. Mansfield* (1841) C. & Marsh. 140; *R. v. Firth* (1869) L. R. 1 C. C. R. 172.

(*k*) *R. v. Long* (1833) 6 C. & P. 179.

(*l*) *R. v. Cobden* (1862) 3 F. & F. 833.

(*m*) *Magee v. Simmons* (1827) 3 C. & P. 75.

Whenever a party is charged with the commission of some tort or crime which involves guilty knowledge or intention, if proof has been given that he did the physical act, but it still remains to be shown whether he committed it with a guilty or an innocent mind, evidence is admissible of the commission by him of similar acts, for the purpose of showing that on the occasion in question he must have acted not inadvertently but with design.

Thus in an action against a life insurance society to recover a sum of money proved to have been obtained by them from the plaintiff, and alleged by the plaintiff to have been so obtained through a fraud of the defendants' agent committed with their knowledge and for their benefit, it was held that evidence of similar frauds committed on other persons than the plaintiff by the same agent and in the same manner, with the knowledge and for the benefit of the defendants, was admissible in support of the plaintiff's allegation of fraud (*n*). The same principle has been applied in actions of libel and slander (*o*), in which evidence is admitted of other defamatory words published either before or after the defamation in question, in order to prove malice. In criminal cases such evidence is most common in prosecutions for knowingly uttering forged documents and base coins; but it is also frequently applied in other cases, as false pretences (*p*), embezzlement (*p*), arson (*q*), and murder (*r*). In *R. v. Geering* (*s*) the prisoner Mary Ann Geering was indicted for the murder in September 1848 of her husband Richard Geering by the administration of arsenic. It would appear that evidence was given tending

(*n*) *Blake v. Albion Life Assurance Society* (1878) 4 C. P. D. 94.

(*o*) *Pearson v. Lemaitre* (1843) 5 M. & G. 700; *Rustell v. Macquister* (1807)

1 Camp. 48, note.

(*p*) *R. v. Francis* (1874) L. R. 2 C. C. R. 128, 132.

(*q*) *R. v. Richardson* (1860) 2 F. & F. 343.

(*r*) *R. v. Gray* (1866) 4 F. & F. 1102.

(*s*) *R. v. Geering* (1849) 18 L. J. M. C. 215; cp. *R. v. Garner* (1863)

3 F. & F. 681; *R. v. Cotton* (1873) 12 Cox, 400; *R. v. Heeson* (1878) 14 Cox, 40.

to show that the deceased had died of arsenical poisoning, and also that the prisoner had lived with him and had generally made tea for him, cooked his victuals, and supplied him with food on his leaving his home to go to work in the morning. The prosecution also tendered evidence to show that the prisoner's three sons, George, James, and Benjamin, had in like manner lived with the prisoner, and been provided for by her; and that in December 1848 George, and in March 1849 James, had died from arsenical poisoning, and in April 1849 Benjamin had been rendered very ill from the same cause. These other cases formed the subject of three other indictments. On the part of the defence this evidence was objected to, but Pollock, C.B., held that it was admissible as relevant to the question whether the taking was accidental or not, and his ruling was subsequently approved by Talfourd and Alderson, B.B.

The conduct from which the guilty knowledge or intention is to be inferred ought to be of the same character as that which is the subject of the inquiry, and on this ground, in prosecutions for receiving goods knowing them to have been stolen, it was held that evidence was not admissible to prove that other stolen property was found in the prisoner's possession, if there was no evidence that he had received such property from the persons who had stolen it (*t*). In order however to enable such evidence of mere finding to be given in evidence in certain cases, it has by sect. 19 of the Prevention of Crime Act, 34 & 35 Vict. c. 112, been provided that—

Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, evidence may be given at any stage of the proceedings that there was found in the possession of such person other property stolen within the preceding period of twelve months, and such evidence may be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings taken against him.

(*t*) *R. v. Oddy* (1851) 2 Den. C. C. 264.

Where the prisoner has had other stolen property in his possession, but has parted with it before the date of the stealing of the property for the receiving of which he is indicted, this section has no application (*u*).

The same section also enacts a further exception to the general rule against evidence of conduct on other occasions than that in question, by providing that—

Where proceedings are taken against any person for having received goods knowing them to be stolen, or for having in his possession stolen property, and evidence has been given that the stolen property has been found in his possession, then, if such person has within five years immediately preceding been convicted of any offence involving fraud or dishonesty, evidence of such previous conviction may be given at any stage of the proceedings, and may be taken into consideration for the purpose of proving that the person accused knew the property which was proved to be in his possession to have been stolen, provided that not less than seven days' notice in writing shall have been given to the person accused that proof is intended to be given of such previous conviction; and it shall not be necessary for the purposes of this section to charge in the indictment the previous conviction of the person so accused.

§ 2.—Character.

The term character denotes not a man's inward disposition, nor the opinion entertained of him by this or that particular person alone (as we speak of a servant's character), but the general reputation and opinion held of him by those who are acquainted with him. The rule which excludes evidence of character applies to both parties, so that whether the alleged act is good or bad, neither may give evidence to show that the person who is alleged to have done it has a disposition or character which makes it probable that he would or would not have done the act in question.

The rule is so long and firmly established that the books present few illustrations of it. On the trial of a prisoner for wounding a constable who had arrested him on suspicion of

(*u*) *R. v. Carter* (1884) 12 Q. B. D. 522.

felony, the counsel for the prosecution asked the constable the following question: "What do you know has been the prisoner's previous character?" The question was objected to on behalf of the prisoner, but allowed. The answer was, "I know the prisoner to be a very bad character." After conviction it was held by the court that this evidence was inadmissible, although the prisoner might have cross-examined the constable as to the grounds of his suspicion; and the conviction was accordingly quashed (*x*). So on a prosecution for an unnatural offence, an admission by the prisoner that he had a tendency to such practices was held inadmissible (*y*). Conversely, in an action of ejectment by an heir-at-law claiming to set aside a will for fraud and imposition committed by the defendant, it was held that the latter was not entitled to call witnesses to prove his general good character (*z*). And on an information (held to be evil in its character) for the recovery of penalties for the keeping of false weights, it was held that the defendant could not call witnesses to character for the purpose of showing that he was incapable of the offence imputed to him (*a*). So in an action of slander for having charged the plaintiff with the theft of certain money, to which the defendant pleaded a justification, it was held that the plaintiff could not call witnesses to prove his general good character for honesty (*b*). There are however two exceptions to this rule, by the first of which evidence of good character is admitted in favour of the defendant in all criminal proceedings, and by the second a prisoner indicted for rape is entitled to call evidence as to the immoral character of the prosecutrix.

(i) *Evidence for the Prisoner of his own Good Character.*—In criminal cases, although the general rule precludes evi-

(*x*) *R. v. Turberfield* (1864) 34 L. J. M. C. 20.

(*y*) *R. v. Cole* (1810) Phill. Ev. vol. i. p. 508.

(*z*) *Goodwright v. Hicks* (1789) B. N. P. 296.

(*a*) *Att.-Gen. v. Bowman* (1791) 2 B. & P. 532, note (*a*).

(*b*) *Cornwall v. Richardson* (1825) Ry. & Moo. 305.

dence of the prisoner's bad disposition or character being given as part of the case for the prosecution, the prisoner is always at liberty to call evidence to show that he has a good character with reference to conduct of the description charged. This exception appears to have been at first admitted in capital cases only, but it has since been extended to all criminal proceedings. Should the prisoner avail himself of his right to offer such evidence, the prosecution is entitled to rebut it by evidence that the prisoner does not really possess the character alleged, as it would be unjust that he should have the advantage of a character which in point of fact is undeserved (*c*). The evidence offered for the prisoner, and that adduced by the prosecution in reply, must be of the same description, that is, it must in each case consist of evidence of general reputation only; no evidence on either side is admissible either of particular acts of conduct on the part of the prisoner, or of the personal opinion of the witness alone as to the prisoner's disposition, however exceptional may have been his opportunities of observation. Hence the proper question to ask, after ascertaining that the witness is competent to speak as to the prisoner's character, is this: "What is the prisoner's general character for honesty (or as the case may be)?" If the witness's answer expresses only his own personal judgment, as, for instance, "My opinion of him is that he is thoroughly honest," it is in strictness inadmissible, although such answers are not infrequently admitted without objection. Again, as it is said that the best character is that which is least talked of, the witness is often permitted to give his evidence in the following form: "I never heard anything against the character of the man for honesty (or as the case may be)."

(ii) *Evidence for the Prisoner, on an Indictment for Rape, &c., of the Immoral Character of the Prosecutrix.*—In prosecutions

(c) *R. v. Rowton* (1865) L. & C. 520, 529.

for rape, or for attempting to commit rape, or for indecent assault, the defendant is entitled to call evidence to show that the prosecutrix has a general bad character in respect of chastity and morality, as, for instance, to prove that she is a common prostitute; but he may not give evidence of specific acts of immorality, unless they were committed with himself, in which case they are held to be relevant, but only upon the question of consent. If such evidence of bad character is called by the defendant, the prosecution may call evidence to rebut it (*d*).

The two exceptions just mentioned, in which evidence of character, in the sense of general reputation, is held to be relevant to the issue whether a particular act has been committed, must be distinguished from cases where the character of a party is expressly put in issue in the case, as happens sometimes in actions of libel or slander; and from cases where character is virtually in issue, in the sense that the amount of damages recoverable depends upon it, as, for instance, in actions for defamation (*e*), seduction (*f*), or breach of promise of marriage (*g*), or in claims of damages for adultery against a co-respondent, which proceed on the same principles as the old action for criminal conversation (*h*). In all these cases the evidence is admitted on different grounds from those discussed in this chapter; the character is either the subject of the inquiry or an element in the estimation of the damage suffered, and does not tend in any way to prove the commission or non-commission of any act.

(*d*) *R. v. Holmes* (1871) L. R. 1 C. P. 334, and cases there cited.

(*e*) *Scott v. Samson* (1882) 8 Q. B. D. 491; *Wood v. Durham* (1888) 21 Q. B. D. 501.

(*f*) *Bamfield v. Mussey* (1808) 1 Camp. 460; *Bate v. Hill* (1823) 1 C. & P. 100; *Verrey v. Watkins* (1836) 7 C. & P. 308.

(*g*) *Foulkes v. Sellicay* (1801) 3 Esp. 236; *Leeds v. Cook* (1803) 4 Esp. 256.

(*h*) 20 & 21 Vict. c. 85, s. 33; B. N. P. 27, 296.

CHAPTER III.

RES GESTÆ AND NARRATIVE.

THE distinction between relevant facts and media of proof, explained in the introduction (a), implies that in any transaction which is the subject of litigation a line can be drawn between such statements of the parties or their agents as form part of the transaction, and are therefore relevant facts, and such as consist of contemporary or subsequent references to it, and are only admissible, if at all, as media of proof. The words which constitute a slander, a fraudulent misrepresentation, or a provocation to assault, are clearly relevant facts in any proceedings founded on those torts; they are acts in law just as much as trespasses to person or property; so are the statements which are made in the course of negotiations leading up to an oral agreement, and which are understood by the parties to form terms of the contract. But the references that the parties may subsequently make to such statements, at any time before the trial of the matters in dispute, are merely narrative in character, and will be admissible in evidence, if at all, under the head of admissions. Statements which have, in the above sense, the character of acts are frequently distinguished from those which are merely narrative by the technical term *res gestæ*. This term appears to denote all acts which are relevant facts, whether consisting of statements or not (b), but is seldom used except for the purpose of emphasizing the distinction in question.

(a) Page 9, above.

(b) *Wright v. Doe* (1837) 7 A. & E. 313, 355.

The practical importance of this distinction lies in this, that as soon as a statement is shown to be a relevant fact it is at once admissible in evidence as such; whereas if, on the other hand, it is shown to be a narrative statement, it is not necessarily admissible merely because it refers to the facts in issue; every medium of proof has its own special conditions intended to insure credibility, and unless therefore it can be shown to satisfy the definition of some one of these media of proof, it is not admissible.

In many cases this distinction is lost sight of by reason of its being of no practical importance. This is generally the case with the statements and conduct of the parties themselves. Inasmuch as all such statements and conduct, subsequent and relating to the transaction in question, are admissible, if not privileged, under the head of admissions or confessions either express or implied, it is immaterial for the most part, save where any question of privilege may arise, to consider where the *res gestæ* cease, and narrative references begin (*c*). Where on the other hand the statement is a statement by the opponent's agent (whose authority is in most cases confined to acting, and does not extend to the making of admissions as to his principal's affairs), the distinction is not unfrequently brought into play. Thus A sues a tramway company for injury caused to him by the tramcar having started whilst he was alighting. Shortly after the accident the engine-driver and the conductor make statements in the hearing of A as to the cause of it. Here it is clear that the statements are no part of the transaction in respect of which A sues, and unless the company's servants had express authority to make admissions about their affairs, they cannot be treated as the admissions of the defendants.

(*c*) But for instances, cp. pp. 10, 209, 214.

The following are some examples from the books.

In an action in 1840 by a stock-jobber for 5,000*l.*, the price of certain stock alleged to have been sold and transferred to the defendant, the defence was that the plaintiff had given credit to one Taylor and not to the defendant. It appeared at the trial that a stock-broker of the name of Taylor had applied to the plaintiff for 5,000*l.* of stock for the defendant, that the plaintiff had procured the same and transferred it in the books of the Bank of England into the name of the defendant, and that the latter had accepted the stock so transferred. The plaintiff's case was that, although it was usual for the seller in such cases to look to the broker, he had in this instance not done so, but had given credit to the defendant alone. On this point evidence was tendered on behalf of the plaintiff of a conversation which had taken place between him and Taylor immediately after the transfer, on the occasion of his asking for payment. The plaintiff requested Taylor to give him the cheque of his principal, whereupon Taylor gave him his own cheque, requesting that it might not be presented until the next day. The evidence was objected to on the ground of the conversation having been subsequent to the transfer; but the objection was overruled, and the ruling of the judge was upheld by the court. Lord Abinger, C. J., said:—

The third point is as to the admission of the evidence of what occurred between Taylor and the plaintiff, immediately after the transaction. As a general principle, it is undoubtedly true that conversations with an agent after the transaction are not evidence against the principal; but the question is, whether this be not a part of the *res gestæ*? It is part of the evidence to show that the plaintiff did not trust Taylor, and I do not know how it could have been shown otherwise. It is before the transaction is concluded, that is, before payment is made; and I think it is receivable; it is not a conversation between an agent and principal after the transaction is concluded, but a conversation at the time he is dealing with him, and a part of the *res gestæ* (*d*).

(*d*) *Mortimer v. McCullen* (1840) 6 M. & W. 58, 69.

In an action for damage brought by the owner of the steamship *Mary Nixon* against the steamship *Douglas* and her freight the case was this: about six o'clock on an evening in October the steamship *Douglas* sank in Gravesend Reach and lay in mid-channel with one mast above water obstructing the navigation. Shortly after midnight the *Mary Nixon* came into collision with the wreck and suffered damage, for which her owners now claimed compensation on the ground *inter alia* of negligence on the part of those in charge of the *Douglas* in not taking proper steps to warn approaching vessels of the position of the wreck. To meet this charge of negligence the defendants tendered evidence to show that the mate of the *Douglas*, soon after the sinking of his vessel, instructed the master of a tug called the *Endeavour* to report the fact to the harbour-master at Gravesend, and request him to take care of the wreck, and that shortly afterwards the captain of the *Endeavour* reported to him, as the fact was, that the harbour-master had said that the proper wreck-lights would be immediately sent to the *Douglas*. This evidence was rejected at the trial on the ground, apparently, that, as hearsay, it was inadmissible; but on an application by the defendants for a new trial it was held by the court that it ought to have been admitted as being a relevant fact to disprove negligence on the part of those in charge of the *Douglas* (*f*); the statements in question were themselves acts of diligence, measures taken towards making the navigation of the river safe.

Further illustrations of the distinction in the case of the statements and conduct of agents will be found in Part III in the chapter on Admissions (*g*), which should be referred to here.

The distinction is no less valid when conduct, equivalent to admissions or declarations of fact or opinion, takes the place of oral statements. Thus in an action of ejectment brought

(*f*) *The Douglas* (1882) 7 P. D. 151.

(*g*) See below, pp. 113—118.

by heir-at-law against devisee the principal question was whether one John Marsden, deceased, who by his will had devised to the defendant the property in question, was at the time of its execution of competent understanding. In support of the testator's competency the defendant tendered in evidence three letters which had been found after the testator's death in a cupboard under a book-case in his library inclosed in envelopes addressed to him, of which the seals had been broken. The first was an affectionate letter from a cousin of the testator while in America referring to other members of the family and to his own travels. The second was from a clergyman referring to some difficulty between the testator and his parish or township, urging that a case should be settled and laid before counsel for his opinion, and requesting an answer. The third was written by another clergyman, on the occasion of his resigning a curacy to which the defendant had appointed him, and was full of warm expressions of gratitude for his kindness. The writers of these three letters were all dead. It was admitted that almost every transaction done or expression used by the testator, and his manner of conducting himself in the most ordinary concerns of life, would be relevant to the issue; but the plaintiff objected to the admission of these letters on the ground that their only effect was to show that the several writers of them had all held the opinion that the testator was a person of ordinary intelligence and capacity (in which view they would not be admissible, being hearsay evidence, the opinions of deceased persons); unless indeed it could be shown that the testator had read and appeared to understand their contents, which would clearly have been an act on his part relevant to the issue of his sanity. There was however no direct evidence that he had ever done so; and it was held that the presumption of their having been read and understood, which in ordinary cases might well have been made from their being found opened among the testator's papers, could not be drawn in this case, inasmuch as the capa-

city of the testator to so read and understand was involved in the very issue to be tried. The letters were accordingly rejected as being neither *res gestæ* nor media of proof, and their rejection was upheld by the court (*h*).

There are three important classes of statements or declarations as to which there seems to have existed some doubt whether they should be regarded as relevant facts or as media of proof. They are known as Declarations in cases of Violence, Declarations as to Declarant's state of Health, and Declarations Accompanying Acts. In this book they have been placed among the media of proof, inasmuch as that appears to the writer to be on the whole their proper place (*i*); but the discussion of them will be found to illustrate the subject of this chapter and they should be referred to here.

The distinction between *res gestæ* and narrative is no less valid in the case of documents than in that of oral statements and conduct, as will be seen in the next chapter.

(*h*) *Wright v. Doe* (1837) 7 A. & E. 313; *S.C.* in H. L. 4 Bing. N. C. 489; cf. *Buckhouse v. Jones* (1839) 6 Bing. N. C. 65.

(*i*) See Chapters VI, VII and VIII of Part III at pp. 142—152.

CHAPTER IV.

DOCUMENTS AS RES GESTÆ.

Definition and Classification.

Evidence Dehors admissible in certain Cases :

- (i) *Identification :*
 - (ii) *Custom of Locality or Trade :*
 - (iii) *Collateral Agreement.*
-

WHETHER in any given case a document is a *res gesta* or a medium of proof, depends, as in the case of any other facts, on the purpose for which it is adduced with reference to the facts in issue. Thus A writes a letter to B complaining that on a certain date he was dismissed from the service of C because he refused to join C in the commission of a crime, and asking for pecuniary aid from B. The alleged grounds of dismissal are false. If proceedings are taken against A, either by C for libel, or by B for obtaining money by false pretences, the letter will be given in evidence as a *res gesta* creating liability. If, on the other hand, in some other proceeding against A, the fact of his service with C should be brought in question, the letter would be admissible against him, not as a relevant fact, but as a medium of proof of the service admitted in it. The same distinction holds good with reference to the different effect in evidence of the recitals and the words of grant in a deed; thus the plaintiff in an action to recover land, who, to prove his right to the property, relies on a series of title-deeds to which the defendant was no party, is entitled to give in evidence against the defendant the operative parts of the title-deeds, since the grants are acts in law

which are relevant to his case; but he is not entitled to read the recitals, since these are simply narratives or records of the facts recited, made by persons who had no authority to make admissions to bind the defendant (*a*). If, on the other hand, the defendant or his predecessors were parties to the deeds, the recitals would, as admissions, be a legitimate medium of proof as against the defendant of any relevant facts stated in them. And so it is with judgments; if in an action by a creditor of a firm against one of its members, the defendant pleads and proves a judgment recovered by the plaintiff for the same debt in a previous action by him against the defendant's co-partner, the judgment pleaded has the force of a *res gesta*, an act in law the operation of which has been to extinguish the defendant's liability (*b*). On the other hand, where in an action of trespass to land the issue is whether the place in question is a public highway, previous judgments recovered by the same plaintiff in similar actions of trespass against other defendants may be given in evidence as a medium of proof analogous to reputation, in aid of the plaintiff's contention that the place is not a highway (*c*).

This distinction leads naturally to this general rule, that when a document is put in evidence as a *res gesta*, it excludes all other evidence of the transaction which it records or constitutes; whereas, when it is put in evidence as a medium of proof merely, it is not exclusive evidence of the fact referred to in it, but its contents may be corroborated or displaced or explained by other evidence. This must not be confounded with the rule, to be mentioned later (*d*), by which the *contents* of a document must be proved by the production and inspection of the document itself, save in certain excepted cases. That is a rule which is equally true of all documents

(*a*) *Bristow v. Cormican* (1878) 3 App. Ca. 641, 643, 644, 662.

(*b*) *Kendall v. Hamilton* (1879) 4 App. Ca. 504.

(*c*) See pp. 176, 177.

(*d*) Page 245.

for whatever purpose they are tendered. The present rule, which might be said to be self-evident but that litigants have so often sought to evade it, prohibits any evidence *outside the contents* of the document with regard to the transaction which is the subject of the document, where by the agreement of the parties or otherwise the document has been constituted *the transaction itself*.

The distinction between a document which is a *res gesta* and one which is only a medium of proof is well illustrated by the difference between a mere receipt and an accord and satisfaction. A passenger injured by a railway accident accepted 400*l.* from the railway company, and gave them a receipt, the body of which was in the following terms:—

Received from the Lancashire and Yorkshire Railway Company the sum of 400*l.* in discharge of my claim in full upon that company for all loss sustained and expenses incurred by the late accident at Miles Platting, September 25th, 1865, including all expenses attending the same. (Signed) THOS. VINCENT LEE.

The passenger afterwards sued for further damages, and in answer to the company's plea that he had accepted the 400*l.* in full satisfaction and discharge, alleged that he had signed the receipt on the express condition that he should not thereby exclude himself from further compensation if his injuries turned out more serious than was supposed at the time. Mellish, L. J., in delivering judgment said:—

I had some little doubt in the course of the argument whether it might not be said that this document amounted to an agreement, in which case, no doubt, the rule of law would apply that, if the parties had reduced their agreement into writing, they could not vary the terms of that agreement by parol evidence; but, on looking at the document, I am convinced it is simply a receipt. It simply states a fact—it does not state an agreement or purport to bind either of the parties to any terms whatever; it simply acknowledges that a sum of money was received, and then states in respect of what it was received, viz., in satisfaction of the damages the plaintiff had sustained in the collision. . . . A receipt not under seal . . . amounts simply to an acknowledgment, and has the same effect as if a man had written a letter saying that he had received a sum of money in satisfaction, or

as if, in the course of conversation, he had mentioned he had received it in satisfaction; it is merely evidence of satisfaction, and liable to be rebutted by contrary evidence (*d*).

The rule has often been called into operation in the case of formal documents, such as wills and deeds, which are usually founded on previous negotiations, drafts, and agreements; and as the only object of tendering evidence of the terms of such preliminary matters is to vary in some respect the effect of the final instrument by showing that it does not truly represent the real intention of the parties, the rule is often expressed simply in these terms, that no evidence may be given to vary or add to the terms of a written instrument (*e*). The evidence is equally excluded by this rule, although it is tendered for the purpose of qualifying not an express but only an implied term of the instrument (*f*); and it excludes written evidence equally with oral (*g*).

Documents which are *res gestæ* come into existence as such in various ways. There are many acts for which writing is not prescribed by law, but which as a matter of convenience, or for the purpose of preserving a record of them, are committed to writing. These may be acts of one party alone, as, for instance, a notice to quit reduced to writing, where under the terms of the tenancy an oral one would have done, or a written gift of a chattel accompanied by delivery. But the most important cases consist of contracts reduced by common consent into writing as a final record of the terms agreed. It is not necessary that the contract should be reduced into a

(*d*) *Lee v. Lancashire and Yorkshire Ry. Co.* (1871) 6 Ch. 527, 534; *cp. Singleton v. Barrett* (1832) 2 C. & J. 368; *Farrar v. Hutchinson* (1839) 9 A. & E. 641.

(*e*) *Countess of Rutland's Case* (1604) 5 Co. 26; *Goss v. Nugent* (1833) 5 B. & Ad. 58, 64; *Nichol v. Godts* (1854) 10 Ex. 191, 194; *Wake v. Harrop* (1861) 6 H. & N. 768, 775; *Burges v. Wickham* (1863) 3 B. & S. 669, 696. The term "instrument," however, is not so wide as "*res gestæ*"; a libel, for instance, or a written notice to quit, would not ordinarily be called instruments.

(*f*) *Burges v. Wickham* (1863) 3 B. & S. 669, 696.

(*g*) *Holhead v. Young* (1856) 25 L. J. Q. B. 290, 293.

single writing; it may be contained in a series of letters or other documents; and it is for the court to determine whether on the face of the documents it appears that they were intended to be the final and sole record of the bargain between the parties, that is, in effect, the very transaction itself (*h*). If the documents do not appear to contain all the terms agreed, or if, though they appear to be final, it is shown that they were only proposals, and were either followed by subsequent proposals or were simply refused, oral evidence will be admissible to explain or displace them. If on the other hand it is proved that they were intended to constitute the contract, they will exclude all evidence *dehors* as to the terms of the transaction (*i*).

There are, again, many acts which are inoperative or invalid as such, unless reduced into writing. These also comprise both unilateral and bilateral acts. Examples of the former are a will, and a notice to quit for which writing is prescribed by the contract of tenancy, and within the same category must be included a libel. Examples of the latter are grants of incorporeal hereditaments by the common law, conveyances under the Act to amend the Law of Real Property, 1845, bills of exchange, and marine policies.

A written memorandum made in pursuance of sect. 4 of the Statute of Frauds (*h*), or of sect. 4 of the Sale of Goods Act, 1893 (*l*), which re-enacts in substance the provisions of sect. 17 of the Statute of Frauds, is sometimes a *res gesta*, and sometimes merely the medium of proof of a transaction prior to the memorandum. The effect of these sections, and of the decisions and rules of court relating to them, so far as they

(*h*) *Wake v. Harrop* (1861) 6 H. & N. 768, 775; *Johnson v. Appleby* (1874) 43 L. J. C. P. 146.

(*i*) *Doe v. Cartwright* (1820) 3 B. & A. 326; *Hawkins v. Warre* (1825) 3 B. & C. 690; *Locket v. Nicklin* (1848) 2 Ex. 93; *Stones v. Bowler* (1860) 29 L. J. Ex. 122.

(*k*) 29 Car. 2, c. 3.

(*l*) 56 & 57 Vict. c. 71.

bear on the subject of this chapter, may be stated as follows: (a) The want of writing does not invalidate the transaction, but only affects the proof of it (*m*); (b) if the written memorandum comes into existence at any time before the bringing of an action for the enforcement of the contract, the statute is complied with (*n*); (c) it is not necessary that the whole contract should be in writing, or that it should be signed by both parties; it is sufficient that the memorandum contains the particulars held requisite for compliance with the statute, and that it be signed by the party who is sought to be charged or his agent in that behalf (*o*); (d) the absence of writing is a defence which the defendant may waive, and which he must specially plead if he intends to rely on it (*p*). It is obvious therefore that in cases falling within this class, when once it has been determined that the memorandum of the transaction satisfies the statute, the further question may still arise whether oral evidence is admissible of other terms than those contained in it, or, in other words, whether the memorandum, besides complying with the statute, was also intended by the parties to be the complete and sole record of the bargain between them. This question must be determined in accordance with the rules already stated (*q*).

The rule under discussion is however subject to certain exceptions, some of which are applicable to all documents which are *res gestæ*, and others to contracts only, as hereinafter mentioned. These exceptions are as follows:—

(i) *Identification*.—Oral evidence is always admissible in order to show what the subject-matter is to which the instru-

(*m*) *Maddison v. Alderson* (1883) 8 App. Ca. 467, 488.

(*n*) *Lucas v. Dixon* (1889) 22 Q. B. D. 357.

(*o*) See the statute itself. The effect of sect. 17, and of the numerous decisions on it, were digested by Mr. Justice Stephen and Sir F. Pollock, and will be found in Vol. I. of the *Law Quarterly Review*, p. 1.

(*p*) R. S. C. Ord. XIX rr. 15, 20; *Clarke v. Callow* (1876) 46 L. J. Q. B. 53; *Dawkins v. Peurhyn* (1878) 4 App. Ca. 51, 58.

(*q*) Pages 68, 69.

ment is applicable, so that it may be read with reference thereto. Thus with regard to wills it is held that oral evidence is admissible to prove all material facts in existence at the date of the will and relating either to the family of the testator or to the subject-matter of the devise, as, for instance, that the property was or was not in the possession of the testator, the mode of acquiring it, and its local situation and distribution, as well as any facts which may have affected changes in the family or in the property between the dates of the will and of the death, and any other facts necessary to be known in order that the will may be correctly applied (*r*). In like manner in an action on a covenant in a lease to keep in tenantable repair oral evidence may be given of the character, age, and condition of the premises at the time of the demise, in order that the covenant may be correctly applied to its subject-matter (*s*). On the same principle oral evidence has been admitted to ascertain the meaning and application of the terms “your wool” (*t*), and “your employ” (*u*), contained in written contracts. A familiar illustration of the rule is supplied by the cases where evidence is admitted to ascertain whether a particular piece of land is “parcel or no parcel” of a certain estate granted by some description or local designation which needs elucidation, such as “Trogue’s farm” (*x*), or “all those brick-works, &c. now in the possession of A. B.” (*y*). And on the same principle stands the evidence admitted to explain old charters by reference to the user and possession had under

(*r*) *Doe v. Huthwaite* (1820) 3 B. & A. 632; *Doe v. Martin* (1833) 4 B. & Ad. 771, 785; *Stringer v. Gardiner* (1859) 27 Beav. 37; *Webber v. Stanley* (1864) 33 L. J. C. P. 220.

(*s*) *Burges v. Wickam* (1863) 3 B. & S. 669, 698, per Blackburn, J.

(*t*) *McDonald v. Longbottom* (1859) 28 L. J. Q. B. 293; 29 L. J. Q. B. 256.

(*u*) *Mumford v. Gething* (1859) 29 L. J. C. P. 105.

(*x*) *Goodtitle v. Southern* (1813) 1 M. & S. 299.

(*y*) *Paddock v. Framley* (1830) 1 C. & J. 90; ep. *Doe v. Hubbard* (1850) 15 Q. B. 227.

them, as, for instance, to prove the extent and meaning of the terms "*terra de Gower*" (z), "inhabitants" (a), "three acres of meadow" (b).

Under the same head fall cases of so-called latent ambiguity, that is, cases where the words of the instrument are in themselves clear, but there exist more than one person or thing to which the instrument may be applied, so that oral evidence is necessary to solve the ambiguity. It is difficult to classify the different cases which have been decided under this rule. The simplest case is where the description is correct but equivocal; as where the devise was "to George Gord, the son of Gord," and there were two George Gord, one the son of John Gord and the other of George Gord (c), or where the devise was of "the close in Kirton, now in the occupation of J. W.," there being two closes in Kirton belonging to the testator each in the occupation of J. W. at the date of the will (d). Sometimes however the difficulty may be complicated by inaccuracy of description. Whether an inaccurate description will vitiate an intended grant or devise (whether there exist ambiguity or not) will depend on whether the part of the description which is accurate is such a complete description that the misdescribing part may be justly regarded as a mistake and rejected as a "false demonstration" in order to prevent the failure of the instrument (e). If on the other hand the misdescription is such that the proof of the grantor's or devisor's real intention would amount to setting up an oral grant or devise, the evidence will be rejected (f). Assuming

(z) *Beaufort v. Swansea* (1849) 3 Ex. 413; cf. *Calmady v. Rowe* (1848) 6 C. B. 861; and *Hastings v. Icalt* (1874) 19 Eq. 558.

(a) *Att.-Gen. v. Parker* (1747) 3 Atk. 576; *R. v. Mashiter* (1837) 6 A. & E. 153; *R. v. Davie*, *ibid.* 374, 386.

(b) *Stammers v. Dixon* (1806) 7 East, 200.

(c) *Doe v. Needs* (1836) 2 M. & W. 129.

(d) *Richardson v. Watson* (1833) 4 B. & Ad. 787.

(e) *Webber v. Stanley* (1864) 33 L. J. C. P. 217, 220.

(f) *Miller v. Travers* (1832) 8 Bing. 244.

however that the inaccurate part can be thus rejected, then, if the accurate part applies equally to two persons or things, the latent ambiguity may be solved as before by oral evidence (*g*).

A somewhat different difficulty is that which is introduced by the use of a word in a non-natural sense. If it can be shown that by constant user within a certain locality or among a certain class of persons a word has acquired an artificial sense, and it appears that the instrument was made under such circumstances that the word may be presumed to have been therein used in that sense, then (whether there be any other source of ambiguity or not) the court will act on the evidence so admitted and construe the document accordingly. On this principle the words "a thousand rabbits" in the lease of a rabbit warren have been held to mean twelve hundred (*h*), and "year" in an actor's engagement to mean the theatrical season (*i*). Somewhat similarly oral evidence has been held admissible to prove that a testator alone habitually used a certain misdescription found in his will, as, for instance, where he always spoke of his wife's nephew as his nephew, although he had a nephew of his own of the same name, with whom however he was not on terms of intimacy (*k*). And where the misdescription is such that it is capable of correction by means of evidence, and after it has been so corrected it still appears that there are two objects to which the term may have been intended to be applied, a case of latent ambiguity arises which may be solved according to the rule by oral evidence (*l*).

(ii) *Custom of Locality or Trade*.—Wherever there exists in a certain locality, or among a certain class of men, as, for instance, those engaged in a certain trade, a usage so general that it may be presumed that parties contracting with

(*g*) *Re Feltham's Trusts* (1855) 1 K. & J. 528.

(*h*) *Smith v. Wilson* (1832) 3 B. & Ad. 728.

(*i*) *Grant v. Maddox* (1846) 15 M. & W. 737.

(*k*) *Grant v. Grant* (1869) L. R. 2 P. & D. 8.

(*l*) *Charter v. Charter* (1871) L. R. 2 P. & D. 315.

relation to that which is the subject-matter of the custom must have contracted with reference to the custom, the terms of the custom will be deemed to have been incorporated in the contract, provided the written terms of the contract are not inconsistent with it, and oral evidence may be given as to its scope and effect (*m*). The most conspicuous instances of this rule are the agricultural customs of different parts of the country, held to be incorporated in leases between landlord and tenant, and the numerous commercial usages to be found in almost every trade in the kingdom (*n*).

(iii) *Collateral Agreement*.—Notwithstanding that a written contract appears on the face of it to be a complete record of the agreement of the parties, it may be proved that it was made subject to some condition or agreement which was intentionally omitted from the document. In cases sought to be brought within this exception it is a question of fact whether the term or condition of which oral evidence is tendered, was on the one hand either mere negotiation or an honourable understanding, or was on the other hand intended by the parties to be a legal obligation collateral to their written contract. The courts have been somewhat liberal in particular cases in adopting the latter view; but it would seem that the principle to be deduced from the cases is this, that the condition will be deemed collateral, and so provable by oral or written evidence *dehors* the main agreement, whenever it can be shown (a) that it is not inconsistent with the terms of the written contract, (b) that it was intended to operate as a legal obligation, and (c) that it was intended to be collateral and deliberately omitted from the written contract (*o*). So defined, this exception may be regarded as a case of one major agreement severed into

(*m*) *Hutton v. Warren* (1836) 1 M. & W. 466, 475.

(*n*) *Wigglesworth v. Dallison* (1779) 1 Sm. L. C.

(*o*) *Morgan v. Griffith* (1871) L. R. 6 Ex. 70; *Erskine v. Adcane* (1873) 8 Ch. 756; *Angell v. Duke* (1875) L. R. 10 Q. B. 174; 32 L. T. 320.

two minor ones, one of which forms the consideration for the other; the major agreement having by common accord been reduced into writing only as to one part of its terms, oral evidence is, in accordance with the general rule before stated, admissible to prove such terms of it as have not been reduced to writing.

All the foregoing cases in which oral evidence is admitted have this common characteristic, that they are cases in which the instrument is not reprobated, but relied on and affirmed, the object of the oral evidence being to explain its terms and interpret them correctly. They must accordingly be distinguished from numerous other cases where oral evidence is admitted, as for the purpose of rectifying the instrument, or for the purpose of showing that it is invalid, or that, although valid, it has been discharged by matter subsequent. It is obvious that none of these cases form exceptions to the rule excluding oral evidence of the transaction recorded and constituted by the document, but are matters belonging rather to the law of contract than the law of evidence.

Part III.

THE MEDIA OF PROOF.

Inspection or View :

- (i) *View during Trial.*
 - (ii) *View before Trial—*
 - (a) *In Civil Cases.*
 - (b) *In Criminal Cases.*
-

THE most direct way of all in which relevant facts can be brought to the cognizance of the judge and jury is by inspection or view. It is obvious that where this is available it must be a better means of knowledge than any of those forms of testimony which are the subject of this Part, in so far as the subject-matter of inspection is by itself completely intelligible; and that even where testimony is required for the purpose of explanation, inspection will still be on many points the most direct mode of gaining information. Where therefore the issue relates to some physical object, the identity, quality or condition of which is or may be relevant, and which can be inspected, this means of information is frequently resorted to.

With regard to portable objects it is a common practice for the party who has the possession of them to bring them into court where the judge and jury may inspect them during the course of the proceedings. Every one is familiar with this kind of evidence; the production in court of the weapon with which injury has been inflicted on person or property, or of articles alleged to have been stolen or damaged, and the like.

With regard to all objects which either cannot be, or in fact are not, brought into court, a view may be had out of court, either during the trial itself, or in certain cases at some prior stage of the proceedings.

(i) *View during Trial*.—During the trial the judge has jurisdiction by the common law, both in civil and criminal proceedings, to adjourn the court for the purpose of a view by the jury of any property or thing of which it is reasonable and convenient in all the circumstances of the case that a view should be had (*a*). Generally the most convenient time for such a view is after the questions in issue have been explained to the jury, but before the evidence has been given; but it may be lawfully had at any time before verdict, and may therefore immediately precede the summing-up of the judge (*b*).

(ii) *View before the Trial*.—By the common law the court had no power to order an inspection before trial, but the jurisdiction has now been conferred upon it in certain cases by statute and rules of court.

(a) In civil cases ample powers for procuring inspection by the judge and jury before trial are now supplied by the combined effect of the following rules of Order L:—

RULE 3. It shall be lawful for the Court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid, to authorize any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorize any sample to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence.

RULE 4. It shall be lawful for any judge, by whom any cause or matter may be heard or tried with or without a jury, or before whom

(a) *R. v. Whalley* (1847) 2 C. & K. 376; *R. v. Martin* (1872) L. R. 1 C. C. R. 378.

(b) *R. v. Martin* (1872) L. R. 1 C. C. R. 378.

any cause or matter may be brought by way of appeal, to inspect any property or thing concerning which any question may arise therein.

RULE 5. The provisions of Rule 3 of this Order shall apply to inspection by a jury, and in such case the Court or a judge may make all such orders upon the sheriff or other person as may be necessary to procure the attendance of a special or common jury at such time and place and in such manner as they or he may think fit.

(b) In criminal cases the powers of the Court are much more limited. By sect. 23 of 6 Geo. 4 c. 50 (which formerly applied also to civil proceedings), it was enacted that—

Where in any case, either civil or criminal, or on any penal statute, depending in any of the said Courts of Record at Westminster (*c*), it shall appear to any of the respective Courts, or to any judge thereof, in vacation, that it will be proper and necessary that some of the jurors who are to try the issues in such case should have the view of the place in question, in order to their better understanding the evidence that may be given upon the trial of such issues, in every such case such Court, or any judge thereof in vacation, may order a rule to be drawn up containing the usual terms, and also requiring, if such Court or judge shall so think fit, the party applying for the view to deposit in the hands of the under-sheriff a sum of money to be named in the rule for payment of the expenses of the view.

The section then provided that the rule should be followed by the issue of a special writ to secure the attendance of the jurors to view the place in question; but this provision has been repealed, and the procedure relating to the view is now regulated by Rules 159 and 252 (q) of the Crown Office Rules, 1886. These provisions are however of a very limited character, as they do not extend to Courts of Assize (*d*), but apply only to proceedings on the Crown side of the Queen's Bench Division. Moreover they authorize only the inspection of such property as answers the description of "the place in question" (*e*).

(*c*) The jurisdiction of these Courts is now, by virtue of the Judicature Acts, vested in the Supreme Court.

(*d*) As to the removal of indictments into the Queen's Bench Division for the purpose of obtaining an order for a view, see C. O. R. 29; and Short & Mellor's Cro. Pr. pp. 94, 95.

(*e*) *Stones v. Menham* (1848) 2 Ex. 382.

CHAPTER I.

DIRECT ORAL EVIDENCE.

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| § 1. <i>The Witness must be competent.</i> | (ii) <i>Incompetency from Interest.</i> |
| (i) <i>Mental Incompetency.</i> | (a) <i>Civil Proceedings.</i> |
| (a) <i>Childhood.</i> | (b) <i>Criminal Proceedings.</i> |
| (b) <i>Insanity.</i> | § 2. <i>The Evidence must be on Oath or</i> |
| (c) <i>Deafness and Dumbness.</i> | <i>Affirmation.</i> |
| (d) <i>Illness.</i> | § 3. <i>The Evidence must be Direct and</i> |
| (e) <i>Drunkenness.</i> | <i>must be given in Open Court.</i> |
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ALL relevant facts, except such as can be viewed by the judge and jury in the manner just described, must obviously be brought to the cognizance of the court by means of some form of statement, oral or documentary; and the law has accordingly defined the kinds of statements admissible for this purpose. The various forms of narrative or record so defined are called the Media of Proof, for the reasons stated in the introduction, where the general relations to each other of these different forms of testimony are discussed (*a*). The rules which define them are all based on the principle that the best evidence must be given that the nature of the case will admit of; in other words, they are all devised to secure, as far as may be possible, the credibility of the information conveyed to the court.

The principal of these media of proof is direct oral evidence, that is, the direct evidence of a competent witness given on oath or affirmation in open court (*b*). It will be

(a) See pp. 5—8.

(b) *Outram v. Morewood* (1793) 5 T. R. 121, 123; *Berkely Peerage Case* (1811) 4 Camp. 401, 414; *Wright v. Doe* (1837) 7 A. & E. 313, 384; *May v. Taylor* (1843) 6 M. & G. 261, 265; *Polini v. Gray* (1879) 12 Ch. D. 411, 425.

convenient to consider separately the three requisites comprised in this definition, namely, competency, the oath or affirmation, and the condition that the evidence must be direct and given in open court.

§ 1.—The Witness must be Competent.

Incompetency denotes the incapacity to give evidence, whether it be general, such as idiocy, or due to a special relation between the person and the proceeding, as in the case of the defendant to a criminal prosecution. The grounds of incompetency were formerly very numerous, and many circumstances which are now regarded as affecting only the weight of a witness's testimony were treated as reasons for disqualifying him altogether (*c*). Most of the disqualifications however not arising from natural causes have now been removed, and the only heads of incompetency at present remaining are mental incapacity and interest. In all other cases persons are competent to give evidence (*d*).

(i) *Mental Incompetency*.—Persons whose understanding is too feeble for any reliance to be reasonably placed on any evidence they may give are incompetent to testify. Such are or may be children of tender years, and persons who are insane, deaf and dumb, ill, or drunk.

(a) *Childhood*.—It was formerly attempted to fix the age at which children should be deemed competent to give evidence, but it is now settled that their competency depends not on their age, but on the degree of intelligence they possess (*c*).

(b) *Insanity*.—Persons who suffer from insanity are not necessarily incompetent. Whether they are fit to testify

(*c*) Gilb. Ev. 4th ed. 119—144; cp. *Berkeley Peerage Case* (1811) 4 Camp. 401, 415; *Jacobs v. Layborn* (1843) 11 M. & W. 685, 691.

(*d*) *Qu.* as to persons under sentence of death. See *R. v. Webb* (1867) 11 Cox, 133; 6 & 7 Vict. c. 85, s. 1; 33 & 34 Vict. c. 23.

(*e*) *R. v. Brasier* (1779) 1 Lea. C. C. 199.

depends on the character and extent of the insanity. An insane person may be quite competent to testify during what are called lucid intervals (*f*); and even during the continuance of the insanity, if it be such as not to render his testimony wholly untrustworthy (*g*). In the case of *R. v. Hill*, cited below, a witness named Donelly had a settled delusion that he was attended by thousands of spirits who entered his body and came round his head and were incessantly speaking to him. He gave a connected and rational account of the transaction he was called to prove, although on one point at any rate, namely the date of the occurrence, he drew a distinction between his own recollection and the suggestions of the spirits, who, he said, assisted his memory. It was held by the court that his testimony had been rightly admitted.

(c) *Deafness and Dumbness*.—Persons deaf and dumb from birth were formerly presumed to be idiots until the contrary was shown (*h*); but now it is simply a question, as in other cases, to be decided by the judge, whether they have sufficient intelligence, as well as capacity to communicate their thoughts to others, to justify the reception of their evidence. Their evidence may be given either by means of signs made to some person sworn to interpret them to the court, or by means of writing, as the judge may direct (*i*). A person who is only deaf or dumb is of course competent to testify, subject to the like conditions.

(d) *Illness*.—It is clear that anyone may be rendered temporarily incompetent by illness.

(e) *Drunkenness*.—The same may be said of drunkenness.

(*f*) Com. Dig. Testmoigne A. 1.

(*g*) *Att.-Gen. v. Hitchcock* (1847) 1 Ex. 91, 95; *R. v. Hill* (1851) 2 Den. C. C. 254.

(*h*) Hale, P. C. 34.

(*i*) *R. v. Ruston* (1786) 1 Lea. C. C. 403; *Morrison v. Lennard* (1827) 3 C. & P. 127; *R. v. Whitehead* (1866) L. R. 1 C. C. R. 32.

The question whether a witness is competent or not, like all questions of the admissibility of evidence, is for the judge alone. For the decision of this question he may examine the proposed witness himself and also hear evidence (*k*). This inquiry is called the examination on the *voir dire* (*l*). Formerly it was necessary that it should be held before the witness was sworn and had begun to give evidence upon the issue, but it is now settled that it may be held at any stage of his examination whenever disqualification is first suspected (*m*). And even although the witness should have been examined on the *voir dire* before the commencement of his evidence, and held competent, yet if it is subsequently discovered that he is in fact incompetent, his evidence will be struck out (*n*).

The test of mental capacity most frequently applied has generally been the capacity of the proposed witness to understand the nature of an oath. The degree of intelligence necessary for this purpose is probably somewhat greater than that requisite for giving such testimony as is worthy of some consideration (*o*); at any rate it has generally been deemed a sufficient test of the capacity to testify. The presence of the two distinct conditions, general mental competency, and the religious sanction of the oath, which is discussed below, are thus conveniently tested by a single inquiry. And hence

(*k*) *Jacobs v. Layborn* (1843) 11 M. & W. 685, 692; *Att.-Gen. v. Hitchcock* (1847) 1 Ex. 91, 95; *R. v. Hill* (1851) 2 Den. C. C. 254.

(*l*) *I.e.*, "truth to tell." *Voire* is the Old French feminine of *vrai*.

(*m*) *Becching v. Gower* (1816) Holt, N. P. C. 313; *Jacobs v. Layborn* (1843) 11 M. & W. 685.

(*n*) *R. v. Whithead* (1866) L. R. 1 C. C. R. 33.

(*o*) This seems to be implied in the provisions contained in sect. 4 of the Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69, and in sect. 8 of the Prevention of Cruelty to, and Protection of Children Act, 1889, 52 & 53 Vict. c. 44, which provide that in prosecutions under those sections the evidence of a child of tender years may be received, although she (or he) does not understand the nature of an oath, if in the opinion of the Court she (or he) is possessed of sufficient intelligence to justify the reception of the evidence and understands the duty of speaking the truth.

it is not the practice to swear a proposed witness for his examination on the *voir dire* (*p*).

(ii) *Incompetency from Interest*.—In order to understand the rules as to this ground of incompetency it is necessary to take note of the state of the common law, which is only in part abrogated. The general rule of the common law was that any person who was interested in the result of the proceedings was incompetent to testify (*q*). By interest was intended not a mere sentiment of partiality, but any certain advantage or disadvantage recognized by the law as resulting from the determination of the proceedings. Thus one who had guaranteed the payment of the costs of one of the parties (*r*), or who had agreed with the plaintiff or defendant for a lease of the premises sought to be recovered in the proceedings (*s*), or who was in *pari jure* with one of the litigants, so that the judgment could be given in evidence for or against himself in future proceedings (*t*), was deemed a person interested. But the most important application of this principle was this, that every party to a cause, whether civil or criminal, was, until the moment when the verdict or judgment had passed for or against him, disqualified by his interest, and was neither competent nor compellable to give evidence for or against himself (*u*). Nor could a party give evidence for or against any co-plaintiff or co-defendant when their cases were tried together (*x*). When this was not the case, as where two defendants to a joint indictment were tried separately, the rule did not apply, because the verdict or judgment upon the first trial could not be pleaded or given in evidence at

(*p*) *Jacobs v. Layborn* (1843) 11 M. & W. 685, 690.

(*q*) Gilb. Ev. 4th ed. 119; Bac. Abr. Ev. (13).

(*r*) *Jacobs v. Layborn* (1843) 11 M. & W. 685.

(*s*) Gilb. Ev. 4th ed. 122.

(*t*) *Bent v. Baker* (1789) 3 T. R. 27, 32; *Smith v. Prager* (1796) 7 T. R. 60; *Fowler v. Port* (1837) 7 C. & P. 792. As to the persons deemed in *pari jure*, see below, p. 176.

(*u*) *R. v. Woburn* (1808) 10 East, 395; *Worrall v. Jones* (1831) 7 Bing. 395.

(*x*) *R. v. Payne* (1872) L. R. 1 C. C. R. 349.

the second (*y*). And an accomplice was never deemed to be disqualified as such by interest (*z*). So if several defendants jointly indicted for some offence were tried together, and one of them was acquitted (*a*), or pleaded guilty (*b*), before the termination of the proceedings against the others, he at once became competent to testify for or against the others, since he had no longer any interest in the result of the proceedings. The same result followed if, in lieu of a verdict of acquittal being entered, the Attorney-General entered a *nolle prosequi* (*c*).

By the same rule it was held that the husband or wife of a party was, from the identity of their interests, neither competent nor compellable to give evidence for or against such party (*d*), or the party's co-plaintiff or co-defendant (*e*). An exception was of necessity admitted in the cases of offences committed by either husband or wife against the person or liberty of the other (*f*). But no such exception was allowed in the cases of offences committed by one against the property of the other (*g*).

The prosecutor in criminal proceedings, inasmuch as the Crown, and not he, is in the position of plaintiff, was not disqualified from giving evidence, save in those cases where the proceedings might result in some advantage to himself, such as the restitution of property or a share in a penalty (*h*).

(*y*) *R. v. Payne* (1872) L. R. 1 C. C. R. 349, 354; *R. v. Bradlaugh* (1883) 15 Cox, 217; cp. *Winsor v. R.* (1866) L. R. 1 Q. B. 390.

(*z*) Gilb. Ev. 4th ed. 136; *R. v. Wilkes* (1836) 7 C. & P. 272; *R. v. Stubbs* (1855) Dears. C. C. 555, 558.

(*a*) *R. v. Paulin* (1824) R. & M. 128; *R. v. Rowland* (1826) *ibid.* 401; *R. v. O'Donnell* (1857) 7 Cox, 337, 341, 342.

(*b*) *R. v. Hinks* (1845) 1 Den. C. C. 84; *R. v. Gallagher* (1875) 13 Cox, 61.

(*c*) Archb. Cr. Pl. 20th ed. 318.

(*d*) Bac. Abr. Ev. A. 1; Gilb. Ev. 4th ed. 133; *O'Connor v. Majoribanks* (1842) 4 M. & G. 435.

(*e*) *Hawkesworth v. Showler* (1843) 12 M. & W. 45; *R. v. Thompson* (1872) L. R. 1 C. C. R. 377.

(*f*) Hale, P. C. vol. i. p. 301; B. N. P. 286, 287; *R. v. Jellyman* (1838) 8 C. & P. 604.

(*g*) Gilb. Ev. 4th ed. 123, 124.

(*h*) Phill. Ev. 10th ed. vol. i. pp. 47—49.

These qualifications however have been, by a number of statutes passed in this century, restricted in criminal and entirely removed in civil proceedings. The legislature has abolished successively the incompetency of the following persons, namely: persons who stand *in pari jure* with the parties (*i*); all persons disqualified by crime or by interest, save the parties on the record or persons on whose behalf the proceedings are taken or defended, and their husbands and wives (*k*); the parties to all civil proceedings, and the persons on whose behalf such proceedings are instituted, except in the case of proceedings instituted in consequence of adultery or for breach of promise of marriage (*l*); the husbands and wives of parties to all civil proceedings and of persons on whose behalf such proceedings are brought or defended, except in the case of proceedings instituted in consequence of adultery (*m*); the parties to actions for breach of promise of marriage; and husbands or wives in proceedings to which they are parties instituted in consequence of adultery (*n*), and in proceedings for the protection of the property of either of them taken under the Married Women's Property Acts of 1882 and 1884 (*o*). The effect of these statutes is to render the persons whom they affect compellable as well as competent to give evidence, except only the parties to actions for breach of promise of marriage, and the parties to proceedings taken in consequence of adultery, and their hus-

(*i*) 54 Geo. 3, c. 170, s. 9; 3 & 4 Will. 4, c. 42, ss. 26, 27; 3 & 4 Vict. c. 26.

(*k*) 6 & 7 Vict. c. 85, s. 1.

(*l*) 14 & 15 Vict. c. 99, ss. 1—3; *Barbat v. Allen* (1852) 7 Ex. 609; *Stapleton v. Croft* (1852) 18 Q. B. 367; *Blackborn v. Blackborn* (1868) L. R. 1 P. & D. 563; cp. *Att.-Gen. v. Radloff* (1851) 10 Ex. 84; and 28 & 29 Vict. c. 104, s. 34, as to Revenue proceedings.

(*m*) 16 & 17 Vict. c. 83. As to County Courts cp. 9 & 10 Vict. c. 95, s. 83.

(*n*) 32 & 33 Vict. c. 68, ss. 1, 2, 3.

(*o*) 45 & 46 Vict. c. 75, ss. 12, 16; 47 Vict. c. 14, s. 1; and see *R. v. Brittleton* (1884) 12 Q. B. D. 266.

bands and wives (*p*). With regard to the latter there is also a certain privilege created, which will be mentioned later (*q*). Besides these enactments, a number of others, relating to criminal proceedings for particular offences, have enabled the defendant, and the defendant's husband or wife, to give evidence therein. By some of these statutes the defendant or defendant's husband or wife is rendered both competent and compellable to give evidence, in others competent only, and in a few instances a new distinction has been introduced by rendering the husband or wife of the defendant competent, and, apparently, compellable also, not at his or her own option respectively, but at the option of such defendant.

The present state of the law is therefore as follows:—

(a) *Civil Proceedings*.—In actions for breach of promise of marriage the parties are competent but not compellable to give evidence. In proceedings instituted in consequence of adultery (*r*) the parties and the husbands and wives of such parties are competent but not compellable (*s*). In all other cases all persons whatsoever are both competent and compellable to give evidence.

(b) *Criminal Proceedings*.—In criminal proceedings the following persons are competent and compellable to give evidence, namely: the prosecutor, whatever his interest; any accomplice or accessory of the defendant not jointly indicted with him; and any person jointly indicted with the defendant, and the wife or husband of such person, provided that such person, by reason either of his pleading guilty, or of a verdict of acquittal or a *nolle prosequi* being entered in respect

(*p*) 32 & 33 Vict. c. 68, s. 3.

(*q*) *Ibid.* and pp. 202—204, below. In criminal proceedings for protection of the property of a husband or wife, the husband or wife is compellable in all cases save where a defendant; see p. 88, No. (13).

(*r*) As to what are such proceedings, see *Guardians of Poor of Nottingham v. Tomkinson* (1879) 4 C. P. D. 343; *Burnaby v. Baillie* (1889) 42 Ch. D. 282, 292.

(*s*) As to privilege in relation to adultery, see below, p. 203.

of him, or by reason of an order for separate trial, is not tried together with the defendant. On the other hand, the following persons are incompetent to give evidence in such proceedings, namely: the defendant, and any person jointly indicted and tried together with him; the wife or husband of the defendant, except in proceedings taken against husband or wife for an offence against the person or liberty of the other; and the wife or husband of any person jointly indicted and tried together with the defendant, unless the proceeding is for an offence against the person or liberty of such wife or husband;—subject, however, to certain statutory exceptions. The principal statutes creating exceptions to the above heads of incompetency are the following:—

- (1) Army Act, 1881, 44 & 45 Vict. c. 58 s. 156 (3).
(Proceedings under sect. 156 of that Act.)
- (2) Betting and Loans (Infants) Act, 1892, 55 & 56 Vict. c. 4 s. 6.
- (3) Coal Mines Regulation Act, 1872, 35 & 36 Vict. c. 76 s. 63 (4).
- (4) Conspiracy and Protection of Property Act, 1875, 38 & 39 Vict. c. 86 s. 11. (Proceedings under ss. 4, 5 and 6 of the Act.)
- (5) Contagious Diseases (Animals) Act, 1878, 41 & 42 Vict. c. 74 s. 66 (6).
- (6) Corrupt and Illegal Practices Prevention Act, 1883, 46 & 47 Vict. c. 51 s. 42 (2).
- (7) Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69 s. 20. (Offences under that Act or under 24 & 25 Vict. c. 100 ss. 48 or 52—55.)
- (8) Customs Consolidation Act, 1876, 39 & 40 Vict. c. 36 s. 259. (Proceedings in the Queen's Bench Division, Revenue side.)
- (9) Evidence Act, 1877, 40 & 41 Vict. c. 14 s. 1. (Indictments for non-repair of highways or bridges, or

nuisances to highways, bridges, or rivers, or other indictments for enforcing civil rights.)

- (10) Explosive Substances Act, 1883, 46 Vict. c. 3 s. 4 (2).
- (11) Licensing Act, 1872, 35 & 36 Vict. c. 94 s. 51 (4).
- (12) Law of Libel Amendment Act, 1888, 51 & 52 Vict. c. 64 s. 9.
- (13) Married Women's Property Acts, 1882 and 1884, 45 & 46 Vict. c. 75 s. 12; and 47 Vict. c. 14.
- (14) Merchant Shipping Act, 1894, 57 & 58 Vict. c. 60 s. 457.
- (15) Merchandize Marks Act, 1887, 50 & 51 Vict. c. 28 s. 10 (1).
- (16) Metalliferous Mines Regulation Act, 1872, 35 & 36 Vict. c. 77 s. 34 (4).
- (17) Prevention of Cruelty to and Protection of Children Act, 1889, 52 & 53 Vict. c. 44 s. 7, and the Prevention of Cruelty to Children (Amendment) Act, 1894, 57 & 58 Vict. c. 27 s. 12, and the statutes referred to in that section.
- (18) Public Health (London) Act, 1891, 54 & 55 Vict. c. 76 s. 118.
- (19) Sale of Food and Drugs Act, 1875, 38 & 39 Vict. c. 63 s. 21.
- (20) Threshing Machines Act, 1878, 41 Vict. c. 12 s. 3.

The effect of these statutes respectively is this, that the defendant is competent but not compellable to give evidence in proceedings under those numbered 1—7 and 10—20, and competent and compellable under those numbered 8 and 9. The husband or wife of the defendant in proceedings under those numbered 1, 4, 6, 7, 12 and 17, and the wife of the defendant in proceedings under number 11, is competent but not compellable; the husband or wife is competent and compellable in proceedings under those numbered 9 and 13; and the husband or wife of the defendant in proceedings under those

numbered 2, 10, 15 and 18, and the wife of defendant in proceedings under that numbered 19, is competent and compellable to give evidence at the option of the defendant alone.

The cases where a person is competent but not compellable to testify only differ from cases of privilege in this, that the term privilege is usually applied to the right of a person, who cannot or does not refuse to give evidence generally, to answer some particular question or class of questions.

§ 2.—The Evidence must be on Oath or Affirmation.

The second requisite of oral evidence is that it must be given upon oath or, where an affirmation may be substituted, upon affirmation (*t*). The oath of a witness consists of a solemn undertaking and appeal; an undertaking to testify truly, and an appeal to God for His favour or displeasure according as the witness keeps or breaks his word (*u*). It is not an exclusively Christian ceremony, nor is it even essential that there should be a belief in a future state of rewards and punishments; it is only necessary that the witness should believe in a God who will reward and punish men according to their deserts (*x*). Hence from very early times persons not of the Christian faith have been sworn to give evidence in our courts. And since the forms of oaths have always differed in different countries according to men's various laws and religions, the particular form or ceremony observed in taking the oath is not regarded as an essential part of it. The form may be that of any religion or sect, or even one moulded to comply with the belief of the particular witness,

(*t*) *R. v. Brasier* (1779) 1 Lea. C. C. 199; *Wright v. Doe* (1837) 7 A. & E. 313, 384.

(*u*) *Omichund v. Barker* (1745) 1 Sm. L. C.; *R. v. White* (1786) 1 Lea. C. C. 430; *The Queen's Case* (1820) 2 B. & B. 285; *Miller v. Salomons* (1852) 7 Ex. 475, 515; *Maden v. Catanach* (1861) 31 L. J. Ex. 118.

(*x*) *Omichund v. Barker*, *supra*.

so long as it is one which he regards as binding on his conscience (*y*). This rule of the common law is now confirmed by statute, enacting that in all cases in which an oath may lawfully be and shall have been administered to any person as a witness, such person is bound thereby, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding on him (*z*).

The form and ceremony generally used on swearing a Christian witness are as follows:—the witness, standing uncovered in the witness-box, holds the New Testament in his bare right hand, and the words of the oath are then addressed to him by some officer of the court. In the case of a civil action tried by a judge and jury the words are usually as follows:—

The evidence that you shall give to the Court and jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth. So help you God!

In a criminal proceeding they run thus:—

The evidence you shall give to the Court and the jury between our Sovereign Lady the Queen and the prisoner at the bar (*or* the defendant) shall be the truth, the whole truth, and nothing but the truth. So help you God!

To these words the witness, without speaking, expresses his assent by kissing the book (*a*). Other forms to like effect framed to suit the occasion are used in other proceedings (*b*). For those who are not of the Christian faith any form and any ceremony may be employed which the custom of the witness's religion prescribes. Thus Jews are sworn

(*y*) *Omichund v. Barker* (1745) 1 Sm. L. C.; *Edmonds v. Rowe* (1824) Ry. & M. 77; *Miller v. Salomons* (1852) 7 Ex. 475.

(*z*) 1 & 2 Vict. c. 105; cp. *Queen's Case* (1820) 2 B. & B. 284.

(*a*) Whence the form of oath is sometimes called the corporal oath, to distinguish it from other forms, where the witness does not touch the book.

(*b*) See Stringer's Oaths and Affirmations.

on the Pentateuch with the head covered (*c*), Mahomedans on the Koran (*d*), and Chinamen by a solemn adjuration accompanying the breaking of a saucer (*e*).

The form of oath usually administered in Scotland consists in the witness standing and holding up his right hand and repeating the words—

I swear by Almighty God, as I shall answer to God at the great day of judgment, that (*continuing as above but in the first person and without the imprecation*),

without being required to hold or kiss a Bible (*f*). And by sect. 5 of the Oaths Act, 1888, 51 & 52 Vict. c. 46, it is now enacted that—

If any person to whom an oath is administered desires to swear with uplifted hand in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question.

By the concluding words is meant that no question shall be asked as to his religious belief.

Since the taking of an oath implies both the intelligence to understand its meaning, and that belief in its obligation without which it is an idle ceremony, any person is disqualified from validly taking an oath who either from mental defect cannot understand, or from want of religious faith does not believe in, its effect. The proper time for ascertaining if a person is thus disqualified is by an examination on the *voir dire*, as explained in the last section (*g*). If however the witness has once declared that the oath actually administered was binding on his conscience, no question may be put to him nor may evidence be given to show that there is some

(*c*) *Omichund v. Barker* (1745) 1 Sm. L. C.

(*d*) *R. v. Morgan* (1764) 1 Lea. C. C. 54.

(*e*) *R. v. Entrehman* (1842) C. & Mar. 248.

(*f*) *R. v. Mildrone* (1786) 1 Lea. C. C. 412; *R. v. Walker*, *ibid.* 498; *Mee v. Reid* (1791) N. P. C. 23. Circular letter from the Home Office sent to clerks of justices, &c., dated 31st May, 1893.

(*g*) See p. 82.

other form which would have been more binding upon his conscience ; but he will be held bound by his oath (*h*). And if some ground of objection is first discovered after the conclusion of the case, as, for instance, that a witness sworn on the Gospels was in fact a Jew, no objection can be taken to the evidence on this ground, but the witness will be held bound by his oath (*i*).

Such is the general law in regard to the oath. It was found necessary however in the course of time to make special provision for two classes of witnesses for whom it was not suited. On the one hand there were Quakers and other persons, who, although possessing both the intelligence and the belief necessary to render an oath valid, objected on grounds of conscience to the taking of one. On the other hand there were atheists and persons of no recognized religious belief, who refused to admit the sanction of the oath, without which the ceremony is meaningless. For both classes provision has now been made by various statutes which permit a solemn affirmation to be made in lieu of the oath in some prescribed form suited to the circumstances of the case, and impose the same liabilities as in the case of perjury, if false evidence be wilfully and corruptly given. As to the first class special provision was first made for Quakers, Moravians (*k*), and Separatists (*l*). This was succeeded by general enactments relating to civil (*m*) and criminal (*n*) proceedings respectively, and providing that if a person called as a witness in any action should be unwilling from alleged conscientious motives to be sworn, the judge or other officer, if satisfied of the sincerity of the objection, should

(*h*) *Queen's Case* (1820) 2 B. & B. 284 ; cp. stat. 1 & 2 Vict. c. 105, above, p. 90.

(*i*) *Sells v. Hoare* (1822) 3 B. & B. 232.

(*k*) 9 Geo. 4, c. 32 ; 3 & 4 Will. 4, c. 49 ; 1 & 2 Vict. c. 77.

(*l*) 3 & 4 Will. 4, c. 82.

(*m*) 17 & 18 Vict. c. 125, s. 20.

(*n*) 24 & 25 Vict. c. 66, s. 1.

permit such person to make in lieu of oath his solemn affirmation in a certain prescribed form.

As to the second class it was enacted somewhat later that if any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, should object to take an oath, or should be objected to as incompetent to take an oath, such person should, if the presiding judge was satisfied that the taking of an oath would have no binding effect on his conscience, make a solemn promise and declaration in the form prescribed (*o*).

These general enactments are now repealed by the Oaths Act, 1888 (51 & 52 Vict. c. 46), which provides in respect of both classes of cases as follows:—

Sect. 1. Every person, upon objecting to being sworn, and stating as the ground of such objection either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath; and if any person making such affirmation shall wilfully, falsely, and corruptly affirm any matter or thing which, if deposed on oath, would have amounted to wilful and corrupt perjury, he shall be liable to prosecution, indictment, sentence, and punishment in all respects as if he had committed wilful and corrupt perjury.

Sect. 2. Every such affirmation shall be as follows:—“I, A. B., do solemnly, sincerely, and truly declare and affirm,” and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.

Sect. 3. Where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, shall not for any purpose affect the validity of such oath.

In two cases special provision has been made for children of tender years who, though incompetent to understand the nature of an oath, yet appear to have sufficient intelligence to give information to the court about the facts in issue. By

(*o*) 32 & 33 Vict. c. 68, s. 4; *Bradlaugh v. De Rin*, W. N. (1870) p. 9; 33 & 34 Vict. c. 49, s. 1.

sect. 4 of the Criminal Law Amendment Act, 1885 (*p*), it is provided that:—

Where upon the hearing of a charge under this section (*i. e.*, for defiling or attempting to defile a girl under thirteen years of age), the girl in respect of whom the offence is charged to have been committed, or any other child of tender years who is tendered as a witness, does not, in the opinion of the court or justices, understand the nature of an oath, the evidence of such girl or other child of tender years may be received, though not given on oath, if in the opinion of the court or justices, as the case may be, such girl or child of tender years is possessed of sufficient intelligence to justify the reception of the evidence, and understands the duty of speaking the truth.

By sect. 8 of the Prevention of Cruelty to, and Protection of, Children Act, 1889 (*q*), the like provision is made in the case of charges brought under that Act. And this has now been extended by the Prevention of Cruelty to Children (Amendment) Act, 1894.

§ 3.—The Evidence must be Direct, and must be given in Court.

The third requisite of oral evidence relates not to the personal qualification of the witness, but to the contents of his evidence. It really comprehends in one proposition two distinct rules.

The first rule is that the witness may not repeat to the court his own previous narratives or statements concerning the relevant facts made to other persons out of court; when he is in the witness-box he must take his mind back directly, so to speak, to the facts he is called to prove, and must give to the court his present recollection of those facts. For instance, this rule will preclude the plaintiff in an action for breach of warranty of the soundness of a horse from saying in the witness-box, “After I bought the horse I rode it home, and when I got home *I told my wife I noticed*

the horse went lame.” He may prove the lameness, but he may not prove his own previous statements to another person about it.

The second rule is that the witness must testify only of those relevant facts which he has himself seen or heard or perceived ; he may not transmit to the court information which he has received from other persons. This rule is familiarly known in the form of the maxim, *Hearsay is no evidence*. Thus, in the supposed action for breach of warranty, the plaintiff will be precluded from saying in the witness-box, “ When I reached home my wife was standing on the door-step ; *she at once asked me what made the horse appear to go so lame.*”

Both rules are based on the same principle, namely, that the law will not (save in exceptional cases to be mentioned in subsequent chapters) receive as evidence of the relevant facts any narrative statement that was not made from personal knowledge and in open court, where evidence can be tested, and, if false, confuted (*v*). The statement referred to in the first of the two examples just mentioned was made from personal knowledge, but it was not made in open court. That referred to in the second example may be criticised equally from two points of view. The wife, whose statement it was, spoke from personal knowledge, but not in open court. Her husband, in repeating her statement, is testifying in open court, but he is vouching the knowledge of another. Therefore, whether the statement be regarded as his evidence or hers, it fails to satisfy the rule.

The first rule, which excludes the previous statements of the witness, is of less importance than the second, as the witness is free to give direct evidence from his present recollection of the facts to be deposed to. And hence the cases are very few in which such statements have been considered

(*v*) *R. v. Eriswell* (1790) 3 T. R. 707 ; *Berkeley Peerage Case* (1811) 4 Camp. 401, 414.

of sufficient importance to be admitted as exceptional media of proof (*s*). Moreover, where the previous statement of a witness has taken the form of a written memorandum, the effect of the rule is considerably qualified by another rule, mentioned in the next Part, which permits a witness under certain conditions to refer to his memorandum for the purpose of refreshing his memory (*t*).

To the second rule, which excludes hearsay, a considerable number of exceptions, to be mentioned in the remaining chapters of this Part, have of necessity been admitted. But in cases which do not fall within any of them the rule prevails even though its enforcement might have the effect of excluding the only information which is available on the matter in question. Hence hearsay will not, apart from such exceptions, be admitted even though it can be proved that the person who made the statement which the witness is prepared to repeat made it on oath (*u*), or that it was against his interest when he made it (*x*), or that he is prevented by insanity or other illness (*y*) from giving evidence himself, or that he has left the country and disappeared (*z*), or has died (*a*). And the rule excludes not only statements, whether oral or written, but also a person's conduct whenever it is relied upon for the same purpose as an express statement, that is, as tending to show his knowledge or opinion in regard to the existence of some fact which it is sought to prove. Thus, where the issue was whether a testator was of sound mind at the time

(*s*) See Chapters VI, VII, VIII and XIV, § 2 of this Part.

(*t*) See Chapter I, § 4 of Part IV, at pp. 231—235.

(*u*) *R. v. Eriswell* (1790) 3 T. R. 707.

(*x*) *Barough v. White* (1825) 4 B. & C. 325, 327, 328; *Phillips v. Cole* (1839) 10 A. & E. 106.

(*y*) *R. v. Eriswell* (1790) 3 T. R. 707.

(*z*) *Stephen v. Gwenap* (1831) 1 Moo. & R. 120.

(*a*) *Wright v. Doe* (1837) 7 A. & E. 313; 4 Bing. N. S. 489; *Berkeley Peerage Case*, 4 Camp. 403, 414.

when he made his will, a question upon which those who knew him would be entitled to give evidence as to his habits and conduct and mental condition, it was held that the defendant was not entitled to put in evidence certain letters from friends and acquaintances of the deceased which were not proved to have been read and understood by him. The only purpose of tendering them in evidence was to show from the nature of their contents that the writers considered the testator as a person of intelligence capable of understanding them; but it was held that this was equivalent to giving evidence of the statements or opinions of the writers without calling them as witnesses (*b*). Again, where the assignees of bankrupt partners sued for goods sold and delivered by the bankrupts to the defendants, and the main question was whether there had been any acts of bankruptcy committed prior to January 1837, the plaintiffs, in order to establish the affirmative, proposed to give evidence to prove that prior to that date the bankrupts had tendered other goods to others of their creditors, who however upon the issue of the fiat of bankruptcy had returned them to the plaintiff's attorney. It was held by the court that as the only materiality of this evidence was to show by the conduct of those creditors that they were of opinion that the debtors were not entitled to transfer the goods to them, the evidence was not admissible any more than statements made by them to the same effect would have been (*c*).

Statements and conduct of this description are often termed *res inter alios actæ* in order to emphasize the fact that they have taken place behind the back and without the acquiescence of the party against whom they are tendered in evidence, and to distinguish them from similar statements (or conduct equivalent to statements) made in the presence

(*b*) *Wright v. Doe* (1837) 7 A. & E. 313; 4 Bing. N. C. 489; cp. pp. 62—64.

(*c*) *Backhouse v. Jones* (1839) 6 Bing. N. C. 65.

of the opposite party against whom they are sought to be given in evidence, which statements or conduct, when taken together with the opponent's answer or conduct in reply thereto, may frequently be given in evidence as admissions by conduct made by the latter, as hereinafter mentioned (*d*).

On the same principle it is held that in any action for damages caused to the plaintiff by some act for which the defendant has been convicted and sentenced in a criminal court, the plaintiff is not entitled, in order to prove the commission by the defendant of the wrongful act, to give the conviction or judgment in evidence against him, if it passed against him in spite of a plea of not guilty. Such a verdict or sentence expresses the opinion of persons who are not now before the court, and the ground of whose opinion cannot now be tested (*e*). And conversely the plaintiff could not give in evidence a verdict or judgment in his own favour, to which the defendant was not a party.

The rule against hearsay applies in strictness to the proof of the relevant facts in the course of cross-examination just as much as to their proof by examination-in-chief. That is to say, a party is not entitled to prove his case merely by eliciting from his opponent's witness in cross-examination not his own knowledge on the subject, but what he has heard others say about it, but has not verified for himself. The application of the rule is however obscured by the fact that the opponent is entitled to test the witness's own conduct and consistency, and for that purpose to interrogate him as to statements made to him by other persons, so that the party by whom the witness was called is not entitled to exclude the question, but only to comment to the jury on the effect and

(*d*) See Chapter on Admissions, at pp. 104—107.

(*e*) *Smith v. Rummen* (1807) 1 Camp. 9; and *Hathaway v. Barrow*, *ibid.* 151, explained by Parke, B., in *Blakemore v. Glamorganshire Canal Co.* (1835) 2 C. M. & R. 133, at p. 139. As to issues concerning public or general rights, see Chapter XI, pp. 176, 177.

value of the witness's answer (*f*). Similar considerations apply with even greater force to the witness's admissions in cross-examination of his own previous statements about the relevant facts.

Opinion of Experts.—There are many matters which are not the subject of direct perception by the senses, and which can only be ascertained by inferences to be drawn by persons trained in some science, art, or business with which the subject is connected. The authorship of an old work of art, or the extent and character of the pollution of a stream, are examples. On all such subjects as these the evidence of experts is admissible (*g*). And inasmuch as their evidence is based partly on observation and partly on calculations and inferences derived from others by means of study and special training, it does not comply precisely with all the requisites of direct oral evidence, and is commonly spoken of as the opinion of experts.

Thus the opinion of engineers is admissible on the question whether a bank erected for the purpose of preventing the overflow of the sea has caused the choking up of a harbour (*h*), the opinion of ship-builders and surveyors as to the seaworthiness of a vessel (*i*), and that of medical men in regard to symptoms of bodily or mental disease (*h*). So, in prosecutions for forging or uttering forged bank notes, or uttering counterfeit money, the opinion of a clerk of the bank, or of an officer connected with the mint, is resorted to. And upon questions as to the infringement of copyright in a piece of music the opinion of musicians is constantly given in evidence as to whether the piece alleged to have been pirated is original, or

(*f*) See in connection with this the observations at pp. 225—228.

(*g*) *Carter v. Boehm* (1765) 1 Sm. L. C. ; *Beckwith v. Sidebotham*, 1 Camp. 116.

(*h*) *Folkes v. Chadd*, 3 Dongl. 157.

(*i*) *Thornton v. Royal Exchange Assurance Co.* (1791) Pea. 25 ; *Beckwith v. Sidebotham* (1807) 1 Camp. 116.

(*k*) *Ibid.* p. 117 ; *R. v. Wright* (1821) R. & R. 456.

as to how far the alleged piracy is an imitation (*l*). And generally as to any question of art, science, or special commercial usage, or of foreign law (*m*), such evidence is admissible. The genuineness of handwriting may now be tested by means of comparison made by any witness or by the jurors themselves (*n*), but it is also not infrequently treated as a subject for expert evidence. On the other hand, where the question is one with which the jury may be presumed to be as well acquainted as any witness, such as questions of morality or professional honour, no such evidence is admissible (*o*). It is not however easy to define precisely the limits of the admissibility of expert evidence. The difficulty is illustrated by the various decisions on the admissibility of evidence of insurance brokers to prove the materiality of particular statements for the purpose of effecting a policy (*p*).

It follows from what has been said that before such evidence can be given the witness must be shown to have sufficient training and skill to entitle him to speak with some reasonable authority upon the particular subject. Thus it has been held that a witness whose knowledge of medicine or of foreign law is derived solely from study unsupplemented by practice is incompetent to give evidence on those subjects respectively (*q*).

(*l*) Phill. Ev. 10th ed. I. 522.

(*m*) *Carter v. Boehm*, 1 Sm. L. C. ; *Re Bonelli* (1875) 1 P. D. 69.

(*n*) 17 & 18 Vict. c. 125, s. 27. See p. 258.

(*o*) *Ramadge v. Ryan* (1832) 9 Bing. 333.

(*p*) See the cases collected in the notes to *Carter v. Boehm*, 1 Sm. L. C.

(*q*) *Bristowe v. Sequeville* (1850) 5 Ex. 275 ; *Re Bonelli* (1875) 1 P. D. 69.

CHAPTER II.

ADMISSIONS.

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- § 1. *Definition.*
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 (i) *Agents of the Parties.*
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§ 1.—Definition.

THE term admission, as here used, means any statement made out of the witness-box by a party to the proceedings, whether civil or criminal, or by some person whose statements are binding on the party, against his own interest. It includes therefore admissions made in answer to interrogatories under Order XXXI, or in answer to a notice to admit facts under Order XXXII; but it does not include admissions of relevant facts made by a party in the witness-box, since these are part of his direct oral evidence; nor admissions made on the pleadings, since their function is to limit the issues and therewith the scope of the evidence admissible; nor any admissions made out of court in so far as they are not merely a medium of proof, but create specific rights and liabilities, as acknowledgments under the Statutes of Limitations, estoppels *in pais*, waiver of forfeiture, and the like.

The term confession is frequently applied to admissions made before trial by the defendant in criminal proceedings.

The guarantee of credibility of this medium of proof is the fact that the statement is against the interest of the person making it (*a*); and a statement is deemed to be against his interest if it tends in any way towards the disproof of any part of his own case, or the corroboration of any part of his opponent's, in the proceedings in which it is tendered.

§ 2.—Form of Admissions.

No particular form is necessary for admissions; they may be either in writing or by word of mouth, express or merely implied from conduct.

Express admissions hardly require illustration, but the following may be given as examples of such admissions made incidentally by means of a description. In an action brought by the assignee of a bankrupt, Durouveray, to recover the proceeds of goods which had been sold by the defendant, an auctioneer, on the bankrupt's account, it was held sufficient *primâ facie* evidence of the bankruptcy for the plaintiff to prove that the defendant had in his catalogue of sale incidentally described the goods as being "the property of Durouveray, a bankrupt" (*b*). And where an action was brought for the breach by the defendant of a contract to carry safely the plaintiff's goods, it was held sufficient *primâ facie* evidence that the defendants were the owners of the vessel, that before action their attorney had incidentally described them as "the owners" in an undertaking to appear on their behalf (*c*).

Admissions may be implied from conduct in such an endless variety of circumstances, that it is only possible to give here a few typical examples.

(*a*) Gilbert, Ev. 4th ed. 137; *Doe v. Wainwright* (1838) 8 A. & E. 691, 700; *Slatterie v. Pooley* (1840) 6 M. & W. 664, 669.

(*b*) *Maltby v. Christie* (1795) 1 Esp. 319.

(*c*) *Marshall v. Cliff* (1815) 4 Camp. 133.

One class of such admissions consists of those cases where a party, by making use of some written document as evidence in his own behalf, is held to have made it available against himself. He is deemed to have thereby impliedly admitted the truth of its contents (*d*), although he is not in like manner bound by all that his witnesses may allege, as he frequently cannot be sure beforehand of all they will say (*e*). Another class consists of those cases where a party performs acts which can only be warranted by his possession of some particular office, and thereby justifies the inference that he is entitled to such office. Thus in an action against a clergyman for non-residence it was held sufficient *prima facie* evidence of the defendant's official character to prove that he had received the tithes, performed the church services, and in other respects acted as the incumbent (*f*). So, in an information against a military officer for making false returns, it was held unnecessary for the plaintiff to produce the defendant's commission, it being sufficient for him to prove that the defendant had as a fact acted as such officer (*g*). And in a prosecution against a letter-carrier for embezzling an overcharge upon a letter, it was held unnecessary for the prosecution to prove the prisoner's appointment, in order to prove that he was employed in the public service, one of the witnesses having given evidence that the defendant had in fact acted as a letter-carrier (*h*).

The converse of these cases are those where one party, by his conduct and dealings with the other, clearly, though impliedly, attributes to the latter the possession of some particular office or character. Thus, where the plaintiff sued as an assignee in

(*d*) *Brickell v. Hulse* (1837) 7 A. & E. 454, 457; *Richards v. Morgan* (1863) 33 L. J. Q. B. 114; and see p. 112 below.

(*e*) *Gardner v. Moutt* (1839) 10 A. & E. 468; *R. v. Latchford* (1844) 6 Q. B. 567, 577; and see pp. 112, 113 below.

(*f*) *Bevan v. Williams* (1776) 3 T. R. 635, note (*a*).

(*g*) *R. v. Gardner* (1810) 2 Camp. 513.

(*h*) *R. v. Borrett* (1833) 6 C. & P. 124.

bankruptcy for the price of goods purchased by the defendant of the bankrupt, it was held sufficient *prima facie* evidence of the plaintiff's appointment as assignee that the defendant had attended meetings of the commissioners in bankruptcy, and, after discussing the cross-accounts between himself and the bankrupt, had made a payment to the plaintiff as assignee (*i*). Analogous to the foregoing are the cases where a party, having debited some third person in account for goods sold or otherwise, has been deemed thereby to have admitted that credit was given by him to such person and not to the party he now seeks to charge (*k*).

Another important class of cases consists of those where the party does not himself say or do anything, but tacitly acquiesces in the statement of some other person under circumstances which make it reasonable to regard his silence as equivalent to assent. Such an acquiescence is worth very little where the party who hears the statement made has no means of his own of knowing whether it be true or false; but if he has those means it may be of great weight (*l*). Thus in an action of ejectment by a landlord against his tenant it was held that the service upon the tenant of a notice to quit, from which it appeared that the tenancy was assumed to be a Michaelmas tenancy, was *prima facie* evidence of the terms of the holding in that respect, being received without objection by the tenant at the time of service (*m*). So in an action for breach of promise of marriage, where it was proved that the plaintiff had said to the defendant "You always promised to marry me, and you don't keep your word" and the defendant made no answer, it was held that this was evidence of the defendant having so pro-

(*i*) *Dickinson v. Coward* (1818) 1 B. & A. 677.

(*k*) *Storr v. Scott* (1833) 6 C. & P. 241.

(*l*) *Hayslep v. Gymer* (1834) 1 A. & E. 162, 165.

(*m*) *Doe v. Forster* (1811) 13 East, 405; *Thomas v. Thomas* (1811) 2 Camp. 647.

mised (*n*). If on the other hand the statement was made under circumstances in which it would not be reasonable to expect a reply, the silence of the person addressed cannot fairly be treated as an admission. Thus, if one of the parties has been present on some occasion at legal proceedings to which he was a stranger, and evidence was therein given adverse to himself, the fact that he did not interpose to contradict the witness or otherwise attempt to displace the effect of the testimony cannot be deemed an admission by him of its truth, since there is a certain formality observed in such proceedings which would prevent his interposing as he might do in the case of ordinary conversation. Nor even if he was entitled, as being himself a party to such proceedings, to cross-examine the witness, and did not do so, is he therefore necessarily to be deemed to have admitted the truth of the whole of such witness's evidence (*o*). It must depend on all the circumstances of the case whether his silence can fairly be construed into an admission or not. So it has several times been held that the non-contradiction by one prisoner of a statement made by his fellow prisoner before the magistrate is not to be deemed an admission (*p*).

At one time it seems to have been thought that a duty was cast upon the recipient of a letter to answer it, and that his omission to do so amounted to evidence of an admission of the truth of the statements contained in it; but no such general rule is now recognized. It may sometimes happen that the relation between the parties is such that a reply might be properly expected, so that an inference might fairly be drawn from the neglect to send one (*q*). But to abstain from taking the trouble to write a reply is obviously a very different thing from silence in the face of a damaging

(*n*) *Bessela v. Stern* (1877) 2 C. P. D. 265, 271, 272.

(*o*) *Melen v. Andrew* (1829) M. & M. 336.

(*p*) *R. v. Applby* (1821) 3 St. 33; *R. v. Turner* (1832) Moo. C. C. 347.

(*q*) *Richards v. Gellatley* (1872) L. R. 7 C. P. 127, 131.

statement made in the course of conversation, and which would involve no trouble to answer. One man has no right to put upon another the burden of the choice of writing a disavowal, or being bound by all the statements in a letter he has received (*r*). If the rule were otherwise, it might easily lead to mischievous attempts to manufacture evidence by making tricky statements of the party's case, and then offering it in evidence as a statement admitted by the opposite party (*s*). In an action for breach of promise of marriage, the promise being denied by the defendant, the fact that the defendant had not answered a letter written to him by the plaintiff, calling upon him to fulfil his promise of marriage, was held not to be any admission on his part in corroboration of the plaintiff's evidence (*t*). Lord Esher, M.R., said :

The first letter put forward by the plaintiff's counsel is one written by the plaintiff to the defendant, in which she states in effect to the defendant that he had promised to marry her. He did not answer it. When one comes to think what is meant by not answering it, it is impossible to see how that could be any evidence in corroboration of the promise to marry. The argument that it was such evidence must be that not answering was an admission by the defendant of the truth of what was alleged against him in the letter. Now, the allegation in the present case was that he had promised to marry the plaintiff. Suppose, however, the letter had charged against him some grievous offence or misconduct, and the writer had stated that unless the defendant paid something he would be exposed. The argument, if true at all, must be that by not answering such a letter the man who receives it must be taken to admit that he is guilty of the charges contained in it. Now, there are cases—business and mercantile cases—in which the courts have taken notice that, in the ordinary course of business, if one man of business states in a letter to another that he has agreed to do certain things, the person who receives the letter must answer it if he means to dispute the fact that he did so agree. So, where merchants are in dispute one with the other in the course of carrying on some business negotiations, and one writes to the other,

(*r*) *Felthouse v. Bindley* (1862) 31 L. J. C. P. 204, 206.

(*s*) *Gaskill v. Skene* (1850) 14 Q. B. 664, 670.

(*t*) *Wiedemann v. Walpole* (1891) 2 Q. B. 534.

“but you promised me that you would do this or that,” if the other does not answer the letter, but proceeds with the negotiations, he must be taken to admit the truth of the statement. But such cases as those are wholly unlike the case of a letter charging a man with some offence or meanness. Is it the ordinary habit of mankind, of which the courts will take notice, to answer such letters; and must it be taken, according to the ordinary course of mankind, that if a man does not answer he admits the truth of the charge made against him? If it were so, life would be unbearable. A man might day by day write such letters, which, if they were not answered, would be brought forward as evidence of the truth of the charges made in them. The ordinary and wise practice is not to answer them—to take no notice of them. Unless it is made out to be the ordinary practice of mankind to answer, I cannot see that not answering is any evidence that the person who receives such letters admits the truth of the statements contained in them. I have, therefore, no doubt that the mere fact of not answering a letter stating that the person to whom it is written had made a promise of marriage, is no evidence whatever of an admission that he did make the promise, and therefore no evidence in corroboration of the promise. I do not say there may not be circumstances, occurring in a correspondence between a man and woman, which would or might make the omission to answer one letter in the correspondence some evidence of an admission of the truth of the statements contained in that letter. There might be a case in which the court thought that, having regard to the nature of the correspondence and the circumstances of it, the not answering one letter in that correspondence did amount to evidence of an admission; but this is not one of those cases. Here we have only to say whether the mere fact of not answering the letters, with nothing else for us to consider, is any evidence in corroboration of the promise. If the fact of the defendant not having answered the plaintiff's letter is no evidence in corroboration, it is clear that the not answering the letter of a mere stranger, such as the pastor of the German church, or the letter of the burgomaster, which does not contain any reference to the alleged promise to marry, cannot be evidence in corroboration.

The most striking examples of admissions by conduct are those which do not relate to any one specific fact, but indicate that the whole claim or defence of the party making it is unfounded. Thus, where the plaintiff sued a railway company in respect of injuries alleged to have been caused to his wife by their negligence, the defendants tendered evidence to show that the plaintiff had suborned as witnesses

several persons who had not been present at the accident, to support his case by means of false evidence with regard to it. The judge ruled that the evidence was admissible, and the court affirmed his decision, and held that the plaintiff's conduct was equivalent to an express admission by him that he had no right whatever to succeed in the action (*u*).

Admissions of this character, inferred from the circumstances of a man's conduct, are well illustrated in many criminal cases. Thus, on the trial of a man for the secret murder of another, the prosecution are entitled not merely to prove circumstances preceding the crime and indicating motive, intention, preparation and opportunity, but also to prove that after it had been committed the prisoner acted like a guilty man in that he concealed an instrument with which it might have been perpetrated, endeavoured to remove bloodstains from his clothes, gave a false account of the mode in which his time had been spent during the period within which the murder must have been committed, and in several respects was noticed to behave in an unusual manner. These two classes of facts, namely, the various acts leading up to the commission of a crime, or other transaction, on the one hand, and the subsequent conduct and statements tending to show a sense of guilt or liability, on the other hand, together form the great bulk of what is commonly known as circumstantial evidence. But although the first class are, strictly speaking, relevant facts, and the second class admissions, the distinction, being in this case of no practical importance, is not ordinarily drawn (*x*).

§ 3.—Admissions of Hearsay, and of the Contents of Documents.

(i) *Hearsay*.—Where an admission is based on hearsay it is still admissible in evidence; but if the hearsay materials

(*u*) *Moriarty v. L. C. & D. Ry. Co.* (1870) L. R. 5 Q. B. 314, 321.

(*x*) See on this subject Chapter I. of Part II. at pp. 42, 43.

on which the admission is based are before the court, and it is clear that a mistaken inference has been drawn from them, the admission is entitled to no weight, and the party may rely on the truth of the facts as they have since appeared (*y*). Even where the facts are not before the court, and the party must be his own judge of the value of the hearsay which he adopts, little weight will attach to his admission unless it appears that it has been advisedly made in such circumstances as to justify the jury in placing reliance on it (*z*).

(ii) *Contents of Documents*.—There was at one time considerable doubt as to whether an oral admission might relate to the contents of a written document not proved to be incapable of production, (though it does not appear to have been questioned in the case of written admissions (*a*)) ; it is now however settled that it may (*b*).

§ 4.—The whole Admission must be taken together.

The party whose statement is put in as an admission has always the right to have the whole statement given in evidence. It would obviously be unfair to allow a party to select from his opponent's statement that portion alone which tells against him, and to suppress that which is in his favour. The chief difficulty in the application of the rule lies in determining when statements are so connected together as to form a whole within the meaning of the rule. The matter does not depend on the statements being contained in one single document, but on the nature and degree of the connection between them; and it may be said that the rule embraces

(*y*) *Bulley v. Bulley* (1874) 9 Ch. 739.

(*z*) *Roe v. Ferrars* (1801) 2 B. & P. 542, 548.

(*a*) For the general rule as to adduction of documents see below, p. 245. For the older cases see Phill. Ev. I. 320—325.

(*b*) *Slatterie v. Pooley* (1840) 6 M. & W. 664; *Murray v. Gregory* (1850) 5 Ex. 468. The rule is severely criticised in *Lawless v. Queale* (1845) 8 Ir. L. R. 382. For the rules relating to cross-examination see pp. 226, 227.

these two propositions: (i) when a party's admission is so qualified or explained by some other statement made by him at the same time that the latter is in fairness necessary to present the true intention and meaning of the former, then the party is entitled to have it put in evidence as a portion of the admission; (ii) when the admission of a party refers expressly or by implication to some antecedent statement either of himself or his opponent or any third person, then the statement so incorporated or referred to forms a part of the whole admission within the meaning of the rule.

The following are examples of the application of the principle in civil cases. Where the plaintiffs had requested the defendant to make out an account of the amount which he owed them for goods sold, but the defendant's agent before delivering it jotted down upon it with his master's authority a note of a counter-claim which the defendant had against the plaintiffs, and the plaintiffs sought to give the account alone in evidence as an admission of the amount of his claim, it was held by Mansfield, C.J., that the whole document must be taken together, since the defendant's statement was made "all in one breath," and he had never admitted the account as distinct and independent from the counter-claim (*c*). Where, on the other hand, the plaintiff had given in evidence certain entries contained in the account books of the defendant, and the defendant thereupon insisted upon his right to have other distinct entries read from other parts of the same book, though unconnected with the former, it was held that, while the defendant was entitled to have the whole of the particular entry read, he could not insist upon reading distinct entries from different parts of the book (*d*). Again, where the plaintiff put in the defendant's answer filed in a previous chancery suit, it was held that the defendant was entitled to have also put in, as part of the plaintiff's case, the bill to

(*c*) *Randle v. Blackburn* (1813) 5 Taunt. 245.

(*d*) *Catt v. Howard* (1820) 3 St. 3.

which it referred (*e*). But if on the other hand it is the incorporated document which is used as an admission, there is no right to insist on that which incorporates it being put in (*f*). The rule is well illustrated by cases relating to conversations and correspondence, and also by some of those relating to the re-examination of witnesses in court, decided on the same principle. Thus it is never allowed that the answers of a party given in the course of conversation should be proved against him, without also giving in evidence the questions which drew forth these answers (*g*). But when a party gives in evidence a statement made by his opponent in the course of conversation on some previous occasion, that does not authorize the latter to prove everything that he said on that same occasion, but only so much of it as can be connected in one of the ways above mentioned with the statement that has been put in (*h*). So, where the plaintiff had given in evidence three letters written by the defendant to his partner abroad, the terms of which were proved, on the non-production of the originals, by means of the defendant's copy letter book, and the defendant contended that he was entitled to give in evidence in his own behalf several others of his own letters contained in the same book, it was held that he was not entitled to give any in evidence except two which were expressly referred to in the three which the plaintiff had put in (*i*).

The principle has been constantly applied in criminal proceedings. Thus, if any part of the prisoner's statement is put in evidence, the prisoner is entitled to have the whole of it proved, notwithstanding that it may implicate other persons, and although they should be on their trial at the same

(*e*) *Pennell v. Meyer* (1838) 2 Moo. & Rob. 98.

(*f*) *Long v. Champion* (1831) 2 B. & Ad. 284.

(*g*) *Pennell v. Meyer* (1838) 2 Moo. & Rob. 98, 99.

(*h*) *Prince v. Samo* (1838) 7 A. & E. 627, 634.

(*i*) *Sturge v. Buchanan* (1839) 10 A. & E. 598, 604.

time (*k*). It is held that the prosecutor is not bound by the prisoner's statement, even if he should put it in, and it is the regular practice for the prosecution to put in the prisoner's statement no less when it is entirely in his favour than when it is adverse to him (*l*).

§ 5. Persons whose Admissions are Evidence.

(i) *Agents of the Parties.*

The parties may be bound not only by their own admissions, but also by those of their agents acting within the scope of their authority. Whether an admission that has been made by a party's agent is receivable against his principal seldom depends upon express authority, but is determined generally by reference to the scope of the agency, and the occasion on which the admission was made. If however a party refers to some third person as being able to give an accurate account of some particular matter, he may thereby make him an agent for the purpose of such statement. As Lord Ellenborough said, "If a man refers another upon any particular business to a third person, he is bound by what this third person says or does concerning it as much as if that had been said or done by himself" (*m*). It is somewhat like the case where a man refers to a document as containing the true account of a particular matter, thereby making it evidence in regard to the particulars for which he has so vouched its correctness (*n*). But the witnesses whom a

(*k*) *R. v. Jones* (1827) 2 C. & P. 629; *R. v. Hearne* (1830) 4 C. & P. 215; *R. v. Fletcher*, *ibid.* 205; *R. v. Walkley* (1833) 6 C. & P. 175; cp. cases in 1 Lew. C. C. 110. But a statement by one prisoner is not evidence against his fellow prisoner; see p. 117 below.

(*l*) *R. v. Jones* (1827) 2 C. & P. 629.

(*m*) *Williams v. Innes* (1808) 1 Camp. 364, and cases there referred to; cp. *Daniel v. Pit* (1809) 2 Pea. 238; *Gardner v. Moulton* (1839) 10 A. & E. 464.

(*n*) *Brickell v. Hulse* (1837) 7 A. & E. 454; *Richards v. Morgan* (1863) 33 L. J. Q. B. 114; see p. 103 above.

party calls at the trial are not his agents within the meaning of this rule (*o*).

In civil and criminal cases alike it is of course necessary to give some evidence of the agency. But inasmuch as in criminal cases the agency, which generally involves conspiracy, is often only to be inferred from the correspondence exhibited in the acts of the parties indicating a joint purpose, it has been repeatedly held that it is no objection to the admissibility of facts tendered in evidence to prove a criminal conspiracy that it consists in part of the very acts which are charged as criminal (*p*).

(a) *Ordinary Business Agents*.—An agent is generally a person employed to perform certain classes of acts on behalf of his principal. It is not therefore ordinarily within the scope of his authority to make any statements which are not necessary for the performance of transactions of the authorized class.

Where the acts of the agent will bind the principal, there his representations, declarations and admissions respecting the subject-matter will also bind him, if made at the same time and constituting a part of the *res gestæ* (*q*).

The rule was thus summed up by Sir William Grant :

What the agent has said may be what constitutes the agreement of the principal; or the representations or statements made may be the foundation of, or the inducement to, the agreement. Therefore, if writing is not necessary by law, evidence must be admitted to prove that the agent did make the statement or representation. So, with regard to acts done, the words with which those acts are accompanied frequently tend to determine their quality. The party, therefore, to be bound by the act, must be affected by the words. But

(*o*) *Gardner v. Moulton* (1839) 10 A. & E. 468; *R. v. Latchford* (1844) 6 Q. B. 567, 577; and see p. 103, above.

(*p*) *The Queen's Case* (1820) 2 B. & B. at p. 310; *R. v. Blake* (1844) 6 Q. B. 126.

(*q*) Story on Agency, § 134.

except in one or other of these ways, I do not know how what is said by an agent can be evidence against his principal. The mere assertion of the fact cannot amount to proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent (*r*).

In short, it will not generally be presumed that an ordinary agent can bind his principal by a mere narrative without express authority to that effect; apart from such authority, no statements by the agent are admissible except such as form part and parcel of his business dealings on behalf of his principal. Thus, where a cargo owner brought an action against insurers for a total loss by capture, and the defendants sought to prove that there had been undue delay on the part of the plaintiff's captain in departing from a certain foreign port, by tendering in evidence letters written to the plaintiffs by their own agents abroad narrating the course and incidents of the voyage, it was held that such letters were not admissible for the purpose, the agents having no authority to make the admissions sought to be relied on. Gibbs, J., said :—

When it is proved that A is agent of B, whatever A does or says or writes in the making of a contract as agent of B is admissible in evidence, because it is part of the contract which he makes for B, and therefore binds B; but it is not admissible as his account of what passes. Now, what are these letters? They are not part of the contract itself or of the *res gestæ*, but they are the account which the agent renders to his principal of what he is doing; they are not, therefore, admissible (*s*).

In another case where the plaintiff sued the defendant, a coal merchant, for penalties for selling coals short of measure, the plaintiff in support of his case called a witness to prove a conversation which he had had with one Pelly

(*r*) *Fairlie v. Hastings* (1804) 10 Ves. 127, 128.

(*s*) *Langhorn v. Allnutt* (1812) 4 Taunt. 511, 519; cf. *Kahl v. Jansen, ibid.*, 565.

who managed the defendant's business on his behalf. Lord Ellenborough admitted the evidence, saying :—

Pelly appeared to be the manager and conductor of the defendant's business; what he might have said respecting a former sale made by the defendant, or on another occasion, would not be evidence to affect his master; but what he said respecting a sale of coals, then about to take place, and respecting the disposition of the coals then lying at the wharf, which were the object of sale, was in the course of witness's employment for the defendant, and was evidence to affect his master (t).

The rule is well illustrated by two cases concerning the authority of railway servants.

In one the plaintiffs brought an action against a railway company for the value of a parcel containing money to the value of 35*l.*, delivered to the defendants and alleged to have been lost by the felonious act of one of their servants. The parcel had been consigned by the defendants' railway to one of their stations addressed to the plaintiffs who carried on business near. The plaintiffs never received the parcel, and on the day of its despatch a porter who was employed by the defendants at the same station disappeared. The plaintiffs called a superintendent of the police to prove a statement which had been made to him by the station-master of the station, tending to prove the commission by the missing porter of the felony alleged. The evidence given by the superintendent, after objection by the defendants, was as follows :—

I am superintendent of police at Ulverston; I know Podmore, the station-master at Ulverston; in consequence of a communication in writing, I went to him on Saturday the 20th of July. He told me that a man of the name of John Haslam had absconded from the service; that a money parcel was missing, and he (Podmore) suspected Haslam had taken it. He said Haslam was the parcel porter. Would I (witness) make inquiries about him?

(t) *Peto v. Hague* (1804) 5 Esp. 134; cf. *Helyear v. Hawke* (1803) 5 Esp. 72, relating to statements of groom authorized to sell a horse; and *Garth v. Howard* (1832) 8 Bing. 451, as to the statements of a shopkeeper's assistant.

A verdict having passed for the plaintiffs, on application made by the defendants for a new trial it was held that the evidence was rightly admitted, since the station-master, having the sole management of the station, must be taken to have had authority to communicate with the police, and to take steps for having Haslam apprehended, and that the statements made by him for the purpose of setting the police in motion, were evidence against the defendants (*u*).

In the other case the plaintiff sued a railway company for the non-delivery within a reasonable time of certain cattle. To prove the cause of the delay he tendered in evidence a conversation which had taken place between himself and a servant of the defendants, who was acting as their night inspector at Didecot Station, about a week after the date when the cattle had arrived at their destination. The plaintiff had said to the inspector, "How is it you did not send my cattle on?" and his reply was to the effect that he had forgotten them. It was held that the statement of the night inspector was inadmissible. He was a subordinate servant and not a general manager of the defendants' business at the station, and the statement had been made long after the termination of the transaction to which it related (*x*).

Since partners and joint contractors are mutual agents for certain purposes, the same rule applies to them, regard being had to the scope of the particular authority in each case.

(b) *Conspirators and Joint Offenders*.—Persons who are guilty of illegally conspiring together or of committing jointly any criminal offence are deemed to be mutual agents or confederates for the purpose only of the execution of the joint purpose. Accordingly any act done by one of them in the execution of the common purpose is deemed the act of the others also, and is consequently admissible in evidence against them; but since the confederacy does not

(*u*) *Kirkstall Brewery Co. v. Furness Rail. Co.* (1874) L. R. 9 Q. B. 468.

(*x*) *Great Western Rail. Co. v. Willis* (1865) 34 L. J. C. P. 195.

extend to the subsequent narration of any such acts, no statement in the nature of mere narrative by one of them is evidence against any other. It is on this principle that the confession of one party to the commission of a crime is not evidence against any of the other parties concerned in it (*y*). The following is a leading case on this rule. Two persons named Blake and Tye were informed against for defrauding the revenue of customs duties upon certain imported goods. Tye was a custom house agent and Blake a landing waiter. Blake alone appeared. It was proved that Tye had purported to make on behalf of the importer a "perfect entry" of the goods, showing their quantities and the duty payable on them; that Blake, after copying the entry into the "customs blue book," and having pretended to check the goods by means of the latter, had marked the entry as "correct," and that the duties had thereupon been paid in accordance therewith. The prosecution, in order to show that the quantity of goods actually imported was much larger than that so shown, that the defendants had received the duties from the importer on the true quantity, and that they had divided the difference between themselves, tendered in evidence—(a) a day-book kept by Tye, containing the entries of the true quantities of the goods and of the true amount of the duties thereon, upon which entries the importer had actually made his payment to Tye; (b) a counterfoil of a cheque, contained in a cheque-book of Tye's, containing an account or memorandum showing that the corresponding cheque had been drawn for a sum equal to half the total amount of certain sums of money, which included *inter alia* the profits made upon this transaction from the alleged fraud, the proceeds of which cheque had been traced to Blake. It was held that the entries in the day-book, being necessary for the purpose of carrying out the fraud, and so forming

(*y*) *R. v. Turner* (1832) Moo. C. C. 347; and see above, pp. 111, 112 (*k*).

part of the transaction, were admissible against Blake; but that the counterfoil, being simply a record of a past transaction kept for Tye's own convenience, was inadmissible (z).

(c) *Counsel and Solicitors*.—Counsel has complete authority over any civil proceeding which he is retained to conduct, as, for instance, the authority to withdraw the record or withdraw a juror, or to select such witnesses as in his discretion he thinks ought to be called, and to take any other step properly incidental to the management and conduct of the action (a). He therefore has authority to make any admissions on behalf of his client which in the honest exercise of his judgment he considers proper. Thus, where a verdict had been taken for the plaintiff in an action subject to the opinion of the court on a special case, and a special case was drafted and signed by the junior counsel of each side, but owing to the omission therefrom of certain material facts the case had to be sent down for trial, it was held that the special case might be put in at the second trial as evidence of all the facts stated in it (b). And so where it appears from the whole conduct by counsel of any particular proceeding that a particular fact is admitted between the parties, this may be given in evidence as an implied admission of the particular fact (c). But this general authority to make admissions may be curtailed by special instructions from the client, although, if such instructions should be disregarded, the counsel's want of authority would not debar the opposite party from using the admission, unless he had notice of its impropriety.

Solicitors have also an implied authority in civil cases to make any admission for the purpose of obviating the necessity of proving any fact upon the trial, as where a solicitor gives a direct and formal admission of the execution of a deed, or

(z) *R. v. Blake* (1844) 6 Q. B. 126.

(a) *Swinfen v. Chelmsford* (1860) 29 L. J. Ex. 382, 397.

(b) *Van Wart v. Wolley* (1823) Ry. & Moo. 4.

(c) *Stracy v. Blake* (1836) 1 M. & W. 168.

of the dishonour of a bill, or where he makes propositions on behalf of his client (*d*). But, although this applies not only to express admissions but also to those which are made incidentally, it does not cover mere loose conversations which do not appear to be made by him in the exercise of his professional duty and to promote his client's advantage, although they may relate to the matters in controversy (*e*). In making admissions the solicitor is bound as towards his client to act honestly and with reasonable skill (*f*). But, even if his admission is unauthorized, the other side may still make use of it if he has no notice of the want of authority (*g*).

Such admissions however are not generally admissible in criminal cases. Thus in a prosecution for perjury where the solicitors on both sides had agreed to dispense with formal proofs, Lord Abinger, C. B., refused to permit the case to be so proved, saying that he would allow no admissions unless made at the trial by the defendant or his counsel, and accordingly in default of proper evidence the defendant was acquitted (*h*). In cases of felony however it is the constant practice of the judges at the assizes to refuse to allow even counsel to make any admission (*i*).

(ii) *Parties who are Trustees or Agents.*

The extent to which a party may be bound by his admissions is sometimes limited by the character in which he sues or defends, as where he sues only as a trustee, agent, or representative of some other person beneficially interested in the subject-matter of the action. In such case only those

(*d*) *Young v. Wright* (1807) 1 Camp. 139.

(*e*) *Ibid.*; and *Parkins v. Hawkshaw* (1817) 2 St. 239; *Petch v. Lyon* (1846) 9 Q. B. 147.

(*f*) *Fray v. Fowler* (1859) 25 L. J. Q. B. 232.

(*g*) As to the period of such authority see *Wagstaff v. Wilson* (1832) 4 B. & Ad. 339; *Butler v. Knight* (1867) L. R. 2 Ex. 109.

(*h*) *R. v. Thornhill* (1838) 8 C. & P. 575.

(*i*) *Phill. Ev.* 10th ed. i. 391.

admissions are receivable in evidence which were made during the period of such nominal party's interest and authority as such. Thus, although a next friend or guardian suing or defending on behalf of an infant has at least as much authority as a solicitor to make admissions during and for the purpose of the cause (*k*), yet as they do but sue as quasi-officers of the court and have no other interest in the subject-matter thereof, any admissions which they may have made before their appointment are not receivable against the infant (*l*). So too admissions made by a trustee in bankruptcy before his appointment are not admissible in evidence against those he represents (*m*). So long as the interest lasts the ordinary rule of course applies. Thus, where a consignor of goods sued the shipowner for negligence in their carriage, but the person who had the substantial interest in the result was the consignee, it was held that admissions made by the consignor that the goods were stowed properly and in accordance with instructions were admissible (*n*). The same is true of the admissions of a husband who sues on behalf of his wife (*o*). And the rule will apply equally in the case of a trustee suing or defending on behalf of his *cestui que trust*, or in that of a banker who sues as the legal holder of a bill indorsed to him for the purpose of collection.

(iii) *Persons for whom the Parties are Trustees or Agents.*

Where an action is brought or defended by a nominal party on behalf of some other person in whom the beneficial interest in the proceedings is really vested, it is obviously just that admissions made by the latter should be binding on the party who represents him. Thus in an action by the master

(*k*) Phill. Ev. 10th ed. i. 364.

(*l*) *Webb v. Smith* (1824) Ry. & Moo. 106.

(*m*) *Fenwick v. Thornton* (1827) M. & M. 51.

(*n*) *Bauerman v. Radenius* (1798) 7 T. R. 663.

(*o*) *Moriarty v. London, Chatham & Dover Rail. Co.* (1870) L. R. 5 Q. B. 314.

of a ship against a charterer upon a charter-party which the former has made on behalf of the shipowner, the defendant is entitled to give in evidence admissions made by the shipowner on whose behalf the master is suing (*p*). And where a defendant was sued in trover for a deed which he admitted that he was detaining on behalf of a third person interested therein, the declarations of such third person were held to be admissible against him (*q*). So, too, admissions made by a *cestui que trust* are binding on the trustee who sues or defends on the former's behalf; although it is doubtful whether such an admission is receivable unless the person making it is the only one who stands to gain or lose by the event of the proceedings; it is at any rate clear that its operation if received would be confined to the interests of the person making it (*r*). The same rule has been applied where the plaintiff sues on a bill of exchange which has been indorsed to him solely for the purpose of suing on behalf of another (*s*). And it is in fact applicable in the case of all parties who are mere representatives of the interests of others.

(iv) *Predecessors in Title.*

The same principle has also been extended to statements affecting property made by predecessors in title of the parties. Any statement made by the possessor of property of any description tending to limit in any way the complete and unfettered ownership thereof by him is deemed an admission, which may be given in evidence against any party who may subsequently become entitled to it; and it makes no difference to the admissibility of such a statement whether the person who made it be living or not. Thus, where the plaintiff sued for trespass to a close of land which he claimed as his exclusive

(*p*) *Smith v. Lyon* (1813) 3 Camp. 465.

(*q*) *Harrison v. Fallance* (1822) 1 Bing. 45.

(*r*) *Doe v. Wainwright* (1838) 8 A. & E. 691; *May v. Taylor* (1843) 6 M. & G. 261.

(*s*) *Walstead v. Levy* (1831) 1 Moo. & Rob. 138.

property, the defendant was held entitled to call a witness to prove that the plaintiff's father, from whom the plaintiff had derived his title, had admitted orally to the witness that his close was subject to common rights of pasture, such as the defendant now claimed, and that he had no right to enclose it; and this, notwithstanding that the father was living and in court at the time (*t*). Again, where the plaintiff brought against his brother an action of trover for a watch, alleging it to be a gift to himself from their father, and the defendant as one part of his defence proved that he had taken out letters of administration to his father's estate, it was held that the plaintiff was thereupon entitled to give evidence of oral declarations in his favour made by the father as to the ownership of the watch, since the defendant had given evidence to show that he claimed under him (*u*). On the same principle it has been held in actions by the indorsee against the maker of a promissory note that the admissibility on the defendant's behalf of admissions of defective title made by the indorser through whom the plaintiff claims, depends on the question whether the plaintiff became the holder of the note after it was due or under other circumstances which would entitle the defendant to say that he took no better title than his indorser had, and was therefore identified in interest with him (*x*).

But the statement must be one which directly affects the person's interest in the property itself; a mere statement against his interest in other respects, as, for instance, that he is in debt, whence it might be inferred that he would be likely to part with or charge his property, does not come within this rule (*y*).

(*t*) *Woolway v. Rowe* (1834) 1 A. & E. 114; cf. *Doe v. Pettett* (1821) 5 B. & A. 223; *Maddison v. Nuttall* (1829) 6 Bing. 226; *Meath v. Winchester* (1836) 3 Bing. N. C. 183.

(*u*) *Smith v. Smith* (1836) 3 Bing. N. C. 29.

(*x*) *Barrough v. White* (1825) 4 B. & C. 325.

(*y*) *Beauchamp v. Parry* (1830) 1 B. & Ad. 89.

In the converse case, where the person who makes the admission is not a predecessor in title of the party, but has derived his title from him, it would be unfair to hold the party bound by it unless it were specially authorized (z). Thus in an action by the owner of one close against the owner of the adjoining one, in which the plaintiff claimed the right to water his cattle at a pond on the defendant's land, and tendered in evidence an admission in his favour made by one to whom the defendant had let his land, it was held that, in the absence of evidence of the defendant's tenant having been authorized by him to make such statement, it was not admissible in evidence (a).

§ 6.—Interrogatories and Notices to admit Facts.

By the Rules of the Supreme Court a party to a civil cause is entitled during the pendency of an action and before the trial to call upon his opponent to make formal admissions of particular facts relevant to the issues, which, if made, will be admissible against the latter at the trial just as much as any informal admission of the kinds described in this chapter.

Rule 1 of Order XXXI provides that—

In any cause or matter the plaintiff or defendant, by leave of the court or a judge, may deliver interrogatories in writing for the examination of the opposite parties, or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof, stating which of such interrogatories each of such persons is required to answer: provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose: provided also that interrogatories which do not relate to any matters in question in the cause or matter shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross-examination of a witness.

(z) *Coole v. Braham* (1848) 3 Ex. 183.

(a) *Scholes v. Chadwick* (1843) 2 Moo. & Rob. 507; cp. *R. v. Bliss* (1837) 7 A. & E. 550.

Rule 2 of the same Order provides that—

On an application for leave to deliver interrogatories, the particular interrogatories proposed to be delivered shall be submitted to the court or a judge. In deciding upon such application, the court or a judge shall take into account any offer which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents relating to the matter in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the court or judge shall consider necessary, either for disposing fairly of the cause or matter, or for saving costs.

The forms of the interrogatories and of the affidavit in answer thereto will be found in Appendix B (*b*).

Rule 4 of Order XXXII provides that—

Any party may, by notice in writing, at any time not later than nine days before the day for which notice of trial has been given, call on any other party to admit, for the purposes of the cause, matter, or issue only, any specific fact or facts mentioned in such notice. And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the court or a judge, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the cause, matter, or issue may be, unless at the trial or hearing the court or a judge certify that the refusal to admit was reasonable, or unless the court or a judge shall at any time otherwise order or direct: provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular cause, matter, or issue, and not as an admission to be used against the party on any other occasion, or in favour of any person other than the party giving the notice: provided also, that the court or a judge may at any time allow any party to amend or withdraw any admission so made on such terms as may be just.

The forms of the notice and of the admissions will be found in Appendix B (*c*).

(*b*) At p. 312.

(*c*) Pages 311, 312.

CHAPTER III.

DECLARATIONS IN THE COURSE OF DUTY.

WHEN a person in the regular course of his duty or office performs some business transaction and makes forthwith a return or record of it which he has no interest to falsify, such return or record is after his death evidence against all persons of the performance of the transaction, and is known as a declaration in the course of duty (*a*). The guarantee of its credibility consists in the obligation to discharge the duty faithfully, and the accuracy which is generally produced by business routine.

Such declarations may be either written or oral (*b*). Thus upon the prosecution of one Buckley for the murder of a police-constable named Green on the night of the 24th of February 1873, in order to show the probability of the deceased and the prisoner having met on that night, the prosecution tendered evidence of an oral statement made by the constable in the course of his duty to his superior officer on that day to the effect that he had received information that Buckley was at his old game of thieving again, and that he (the constable) was going that night to watch his movements; and it was held that the statement was admissible as a declaration in the course of duty (*c*). But

(*a*) *Priee v. Torrington* (1704) 1 Sm. L. C. ; *Polini v. Gray* (1879) 12 Ch. D. 411, 429, 430 ; *Sturla v. Freccia* (1880) 5 App. Ca. 623, 640.

(*b*) *Sussex Peerage* (1844) 11 Cl. & Fin. 113 ; *Stapylton v. Clough* (1853) 2 E. & B. 933.

(*c*) *R. v. Buckley* (1873) 13 Cox, 293.

almost all the examples of the rule will be found to consist of written entries.

The leading case with regard to these declarations is Price v. Earl of Torrington (*d*). There the plaintiff, being a brewer, brought an action against the Earl of Torrington for beer sold and delivered, and the evidence given to prove the delivery to the defendant was that according to the usual practice in the plaintiff's business his draymen came overnight to the clerk of the brewery and gave him an account of the beer they had delivered out, which he set down in a book kept for the purpose, to which the draymen set their names. The drayman who had delivered the beer in question was dead, but the plaintiff's book containing an entry of the delivery, the signature to which was proved to be that of the deceased drayman, was tendered in evidence and admitted as a declaration made in the course of the drayman's duty. So in an action commenced on the 20th of April 1815 on an attorney's bill, where the only question was whether a bill had been delivered according to the statute one month before action, the draft bill having been produced containing an indorsement in the handwriting of a deceased clerk of the plaintiff's in the following terms, "March 4th 1815 delivered a copy to Mr. Peck," and it having been proved that the indorsement was upon the document on the date mentioned, it was held that this was sufficient *prima facie* evidence of the due delivery of the bill (*e*).

The office or employment to which the duty is attached may be private, as in the case of an ordinary clerk; or public, as in that of a sheriff (*f*), or of a notary public (*g*).

(*d*) 1 Sm. L. C.

(*e*) *Champneys v. Peck* (1816) 1 St. 404; cf. *Doe v. Turford* (1832) 3 B. & Ad. 890.

(*f*) *Chambers v. Bernasconi* (1834) 1 C. M. & R. 347.

(*g*) *Poole v. Dicus* (1835) 1 Bing. N. C. 649.

It is not enough that the entry has been made in the course of business; it is essential that it should also have been the duty of the declarant to make it. In an action brought against one C. J. Allen and another in order to obtain a declaration that the defendants were bound to indemnify the plaintiff against all liability in respect of 200 shares in the International Contract Company (in respect of which the plaintiff had been fixed upon the "B" list of contributories) upon the ground that the said shares had been vested in the plaintiff solely as trustee for the defendants, the plaintiff, in order to prove that the shares had been in truth purchased by the said Allen, tendered in evidence the day-book of one Griffiths, deceased, the stockbroker who had purchased the shares, as the plaintiff contended, on the defendant's behalf. The book contained the following entry:—

26th April, 1864.							
				£ s. d.			
International Ct. 18 July				£ s. d.			
Bot. for C. J. Allen				C. Allen - 1406 5 0			
200 Inter. Cont. 5 p.c.—2 = 1400 0 0				N. Morris 1400 0 0			
$\frac{1}{2}$ commn.	-	-	-	6 5 0			
Stp.	-	-	-	5 2 6			
				6 5 0			

The witness who produced the book explained that the entry meant that on the 26th of April 1864 two hundred shares with 5*l.* paid on them were bought at 2*l.* premium for 1,400*l.* from Norman Morris, stockjobber, for C. J. Allen, and that C. J. Allen was charged 1,406*l.* 5*s.* for the purchase-money and half the commission, and that the 18th of July was the settling day. It was held that the entry was inadmissible on the ground that there was nothing to show that it was the duty of the broker as between himself and his client Mr. Allen to make any such entries (*h*).

The only apparent exception to this part of the rule is presented by the case of *Doe v. Turford* (i). There the question was whether the service of a notice to quit could be proved by means of a memorandum stating the fact and time of such service indorsed upon a duplicate of the notice produced from the attorney's office. It was proved that it was the usual course of practice in the office for clerks to serve notices to quit on tenants, and to make indorsements similar to that in question upon duplicates of the notices. In the case in question however the service had been effected, and the indorsement made, by the attorney himself, who had since died. It was held that his indorsement was admissible as a declaration in the course of duty. It appeared that in consequence of the absence of his clerk or for some other reason the principal had in this particular instance performed the clerk's duty for him, and it was held that his indorsement was tantamount to his clerk's, and the case has always been so explained (k).

It is not sufficient that the declarant should have had personal knowledge of the transaction recorded; it must be one that he himself has performed, and one of a class which it was his specific duty to perform; and the entry, unlike a declaration against interest, must have been made at the time of or immediately after the performance of the transaction (l). The case of the *Henry Coxon* (m) is a good illustration of some of these points. It was an action by the owners of the steamship *Gange* against the owners of the *Henry Coxon* for damages in consequence of a collision between the two vessels in Sea Reach in the river Thames

(i) (1832) 3 B. & Ad. 890.

(k) *Ibid.* pp. 895, 896; *R. v. Worth* (1843) 4 Q. B. 132, 138, 139; *Smith v. Blakey* (1867) L. R. 2 Q. B. 326, 333.

(l) *Doe v. Turford* (1832) 3 B. & Ad. 890; *Brain v. Preece* (1843) 11 M. & W. 773; *Smith v. Blakey* (1867) L. R. 2 Q. B. 326; *Polini v. Gray* (1879) 12 Ch. D. 411; *Sturla v. Freccia* (1880) 5 App. Ca. 623, 640.

(m) (1878) 3 P. D. 156.

on the 12th of January 1878. To rebut the plaintiff's allegation of negligence the defendants tendered in evidence certain entries made in the log-book of the *Henry Coron* which had been made therein on Monday the 14th of January 1878, two days after the collision, by the first mate who was since deceased. It was held that the entries were inadmissible upon the grounds that (a) the log-book could not as to these entries be considered as a contemporaneous declaration; (b) that it was the interest of the first mate to represent that the collision had taken place in consequence of the bad navigation of the *Gange* and not of his own vessel, and (c) that the entries were not confined to acts done by the first mate himself, but related to the conduct of other persons.

These declarations, unlike those against interest, are not admissible as evidence of any other matters than the particular transaction which it was the duty of the declarant both to perform and to record, however intimately any such collateral matters may be incorporated in the statements (u).

(u) *Chambers v. Bernasconi* (1834) 1 C. M. & R. 347; *Smith v. Blakey* (1867) L. R. 2 Q. B. 226, 332, 335; *Polini v. Gray* (1879) 12 Ch. D. 411, 419—422, 426, 430.

CHAPTER IV.

DECLARATIONS AGAINST INTEREST.

§ 1.—*Against Pecuniary Interest.*

§ 2.—*Against Proprietary Interest.*

DECLARATIONS against interest are statements made by deceased persons adverse to their pecuniary or proprietary interest; and the guarantee of their credibility consists in the fact that they are thus opposed to the declarant's interest, since it is the general experience of mankind that statements so made are likely to be true (*a*). But declarations against interest in any other sense, as for instance an admission of liability to criminal prosecution, do not come within the rule (*b*).

§ 1.—*Against Pecuniary Interest.*

A declaration is against the pecuniary interest of the declarant who makes it whenever it has the effect of charging him with a pecuniary liability to another, or of discharging some other person upon whom he would otherwise have a claim (*c*). It is immaterial that the declaration may prove, in the circumstances which have happened at the time when it is sought to be put in evidence, to be for the interest of

(*a*) *Middleton v. Melton* (1829) 10 B. & C. 317, 327; *Gleadon v. Atkin* (1833) 1 C. & M. 410, 425; *R. v. Birmingham* (1861) 31 L. J. M. C. 63, 67; *Bewley v. Atkinson* (1879) 13 Ch. D. 283, 297; cp. *Rowe v. Brenton* (1828) 3 M. & R. 267.

(*b*) *Sussex Peerage* (1844) 11 Cl. & Fin. 103, 113, 114.

(*c*) *Doe v. Robson* (1812) 15 East, 32; *Davis v. Lloyd* (1844) 1 C. & Kir. 275.

the declarant's estate, or even that it can be shown by independent evidence to have been in truth for his interest at the time when it was made, provided that standing by itself it was at the time when it was made against his interest. Thus in an action by the executor of one Taylor, by which it was sought to establish against the defendant a debt of 2,000*l.* as due to the testator's estate for money lent, and where the defence was that the defendant had received it as a gift, the plaintiff tendered in evidence a private account-book of the deceased containing (a) entries of several sums of 20*l.* each purporting to have been received from the defendant as quarterly payments of interest, and (b) an entry stating that the defendant had on a particular date acknowledged that he had borrowed of the testator the sum of 2,000*l.* The defendant objected to the admissibility of the book on the ground that the tendency of the entries was to establish the claim for 2,000*l.* in favour of the estate. But it was held that, since the entries of the receipt of interest taken by themselves were at the time when they were made against the interest of the testator, all the entries were admissible (*d*).

When once it appears that a declaration is against interest, the whole of the statement of which it forms part becomes admissible, even though it should contain a statement of other collateral matters which are not similarly against interest. Thus in the case just cited not only the entries of the receipt of interest were admissible, but also that in the testator's favour by which he recorded the defendant's acknowledgment of the loan. This rule was laid down in the leading case of *Higham v. Ridgway* (*e*). There the question was whether one William Fowden junior was born before or after the 16th of April 1768. The plaintiff, in order to prove that his birth was subsequent to that date, tendered in evidence the following entries from the day-book and ledger

(*d*) *Taylor v. William* (1876) 3 Ch. D. 605.

(*e*) (1808) 2 Sm. L. C.

of a man-midwife who had attended the mother of William Fowden junior at his birth, and was since deceased :—

DAY BOOK ENTRIES.

✓
22nd April, 1768.

38 (*f*) Richard Fallows' wife. Bramhall. Filius circa hor. 9, matutin. cum forcepe, &c. paid.

[Then followed in the same page the entry in question, without any intervening date.]

✓Wm. Fowden, junr.'s (*g*) wife, 79 (*f*) filius circa hor. 3 post merid. nat. &c.

LEDGER ENTRY.

Wm. Fowden, junr., 1768.

Aprilis 22. Filius natus, &c.

Wife - - - - - 1 6 1

26th. Haustus purg. - - - - - 0 15 0

2 1 1

Pd. 25th Oct., 1768.

It was held that all these entries were connected together as one whole, and that the entry as to the payment of the man-midwife's charges rendered them all admissible.

The question has several times arisen, in the case of written entries, as to what is to be deemed the whole statement within the meaning of this rule. It would seem that the same tests which have been stated in regard to admissions must be applicable here, namely, that the statement which is sought to be given in evidence as a part of the main statement must, if antecedent, have been incorporated in it by reference, and, if contemporary, have been virtually parcel of it (*h*). Accord-

(*f*) The figures 38 and 79 referred to the corresponding entries in the ledger.

(*g*) This was the designation at that time of the father of the William Fowden, jun., in question.

(*h*) Pages 109—112, above.

ingly it is well settled that it is not admissible to give in evidence the discharging items entered in an account book unless they are referred to in some entry against the declarant's interest upon the charging side of the account, or the two formed one contemporaneous statement (*i*).

It is stated in many of the cases that in order to render the declaration admissible the declarant must have possessed peculiar means of knowing the facts stated (*k*). This phrase is somewhat vague. In regard to most declarations it is direct personal knowledge which is required. And in the present class the particular statement which is against interest can hardly be based on anything but the direct personal knowledge of the declarant. But although the rest of the statement will probably be generally of the same character, it will not always be so. Even however where part of the statement is based on hearsay evidence it would seem that the rule by which the whole statement is to be admitted prevails to render it evidence.

Thus where the clerk who had kept the weighing-books of certain mines, in which were entered the quantities of ore raised and the names of the workings from which they had been gotten, was dead, and the books were tendered in evidence in order to show that a lessee of some of the mines had at a certain period received toll upon the ore raised from one particular mine, it was objected that the clerk's entries which both charged himself with the ore received and also stated from what particular mines the ore had been extracted, were inadmissible to establish the latter fact, it having been proved

(*i*) *Rowe v. Brenton* (1828) 3 M. & R. 267; *Williams v. Geaves* (1838) 8 C. & P. 592; *Knight v. Waterford* (1840) 4 Y. & C. 283; *Doe v. Bevis* (1849) 7 C. B. 456; cp. *Higham v. Ridgway* (1808) 2 Sm. L. C.; *Stead v. Heaton* (1792) 4 T. R. 669.

(*k*) *Higham v. Ridgway* (1808) 2 Sm. L. C.; *Doe v. Robson* (1812) 15 East, 32; *Middleton v. Melton* (1829) 10 B. & C. 228, 317; *Gleadow v. Atkin* (1833) 1 C. & M. 410.

that when the ore was brought to the weighing-house by the mine-captains or tollers they were asked from which mine it had been raised. But the court held that it was not necessary that the deceased person should have had personal knowledge of the fact stated; that if the entry charged himself, the whole of it became admissible against all persons, and that the absence of such knowledge went to the weight not to the admissibility of the evidence (*l*). Assuming that the rule is laid down in correct terms in the last-cited case (*m*), then this class of declarations presents a divergence from the general principle that declarations of deceased persons must express the direct personal knowledge of the declarant (*n*).

Where the fact that the declaration is against the declarant's interest does not clearly appear from the statement itself, as for instance where it does not show the declarant's character, without which it is not clear on what account or in what right the money was received, it is permissible to give independent evidence to supply this want, as by proving that the declarant was an agent or receiver on behalf of another, or that the money paid to him was not a gift but in discharge of a legal claim. Slight evidence will often be sufficient for this purpose. It may be that the book in which the entries occur clearly purports by its title or general character to be the book of a steward or receiver (*o*); or the same fact may appear from other entries in the same document; although this fact may not be inferred merely from the similarity of

(*l*) *Crease v. Barrett* (1835) 1 C. M. & R. 919, 923—925.

(*m*) But see per Lord Selborne, L. C., in *Sturla v. Freccia* (1880) 5 App. Ca. at pp. 632, 633.

(*n*) *Ibid.*; and consider *Higham v. Ridgway* (1808) 10 East, 120; *Gleadow v. Atkin* (1833) 1 C. & M. 410, 423; *Trimblestown v. Kemmis* (1843) 9 Cl. & F. 780; *Sussex Peerage* (1844) 11 Cl. & F. 103, 113, 114; and *Bewdley v. Atkinson* (1879) 13 Ch. D. 283, 297.

(*o*) *Exeter v. Warren* (1814) 5 Q. B. 773; *Doe v. Michael* (1851) 17 Q. B. 276.

the book in question to other books which can be shown to be receiver's books (*p*).

A declaration against interest may be in writing or oral (*q*). If it be in writing it is not necessary that it should have been signed, if it can be shown either that the body of it was written by the person whom it purports to charge (*r*), or that it has been adopted by the person whom it charges, in whosoever handwriting it may be (*s*); and in the latter case it is not necessary to call the agent who wrote it (*t*).

Nor is it necessary that such declarations should be contemporaneous with the fact recorded; it is sufficient that they are made at any subsequent time (*u*).

With regard to the indorsement of payments of interest upon bonds and negotiable instruments, it is evident that where the indorsement is of such date as, if admitted as evidence, to have the effect of preventing the operation of the Statute of Limitations, the entry is not wholly against the interest of the party making it, since although it acknowledges the payment of the interest, such payment has the effect of preventing the claim to the capital sum from being barred. It is not clear whether by the common law such indorsements require corroboration; the balance of authority appears to be in favour of their being admissible without it, however the weight of such evidence may be affected by the circumstances referred to (*x*). But so far as negotiable instruments are concerned corroboration is now rendered

(*p*) *Doe v. Thynne* (1808) 10 East, 206.

(*q*) *R. v. Birmingham* (1861) 31 L. J. M. C. 63; *Bowley v. Atkinson* (1879) 13 Ch. D. 283.

(*r*) *Barry v. Bebbington* (1792) 4 T. R. 514; *Exeter v. Warren* (1844) 5 Q. B. 773.

(*s*) *Ibid.*; and *Doe v. Hawkins* (1841) 2 Q. B. 212.

(*t*) *Ibid.*

(*u*) *Doe v. Tarford* (1832) 3 B. & Ad. 890, 897, 898.

(*x*) *Rose v. Bryant* (1809) 2 Camp. 321; *Smith v. Buttens* (1834) 1 Moo. & Rob. 341; *Anderson v. Weston* (1840) 6 Bing. N. C. 296.

necessary by 9 Geo. 4 c. 14 s. 3, which provides that no indorsement or memorandum of any payment written or made upon any promissory note, bill of exchange or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of the Statute of Limitations, 21 Jac. 1 c. 16.

§ 2.—Against Proprietary Interest.

Any declaration made by one who is in possession of any description of hereditament tending to limit his interest therein to any less estate than the whole fee simple is admissible in evidence after his death as a statement against his proprietary interest (*y*). And *a fortiori* if it shows that he has no interest in the land whatever (*z*). This is based on the well-known rule of law, that a person in possession of land is presumed, until the contrary appears, to be the owner thereof in fee simple (*a*). The rule therefore is not applicable where the declaration simply relates to the limits of the land occupied by the declarant, since there is nothing to show that it is more against his interest to deny his possession of one close than it is to assert his possession of another (*b*). It is difficult to see on the other hand any objection in principle to treating declarations by a deceased occupier of land which admit the existence of an easement over it as being within the rule, since although there is no presumption of law that land is held free from easements, the admission of their existence might well be considered a statement against interest. It has however been decided

(*y*) *Peacable v. Watson* (1811) 4 Taunt. 16; *R. v. Birmingham* (1861) 31 L. J. M. C. 63; *R. v. Exeter* (1869) L. R. 4 Q. B. 341.

(*z*) *Gerry v. Redman* (1875) 1 Q. B. D. 161.

(*a*) *Ibid.*

(*b*) *Creuse v. Barrett* (1835) 1 C. M. & R. 919, 931.

otherwise in several cases. Thus where on an indictment for obstructing the public highway the prosecution tendered a declaration by a deceased occupier of land over which the road in question ran, admitting the existence of the public way, it was held that such statement was inadmissible (*c*). It is true that the declarant in that case was only the tenant of the land, and that the rejection of the evidence was justified on the ground that its admission would contravene the rule that a landlord cannot be bound by a declaration of his tenant. But the decision also implies that the declaration of an occupier of land admitting an easement over it is not admissible as a declaration against interest within the meaning of the present rule; and it has been so understood.

As in the case of a declaration against pecuniary interest, as soon as the adverse interest is proved the whole statement becomes admissible. Thus in an action of ejectment the plaintiff, in order to show the seisin of one Robert Farthing through whom he claimed, called a witness to prove that he had heard one Clark now deceased say that he rented the premises in question from the said Farthing; it was held that such evidence was admissible as soon as some preliminary proof had been given that the declarant was at the time of the statement in possession of the premises for which the ejectment was brought, although the only part of the statement which was, strictly speaking, against the declarant's interest was that which admitted that he was merely a tenant; and the name of the person whose tenant he was was merely collateral (*d*). In the same way statements by tenants have been admitted to prove not merely the fact that they were tenants, but also both the amount (*e*) and the

(*c*) *R. v. Bliss* (1837) 7 A. & E. 550; cp. *Scholes v. Chadwick* (1843) 2 Moo. & Rob. 507.

(*d*) *Peaceable v. Watson* (1811) 4 Taunt. 16.

(*e*) *R. v. Birmingham* (1861) 31 L. J. M. C. 63.

payment (*f*) of the rent, and in like manner to establish the fact that the land is of copyhold tenure (*g*).

Such declarations may not only be either in writing or oral (*h*), but may also, like admissions, take the form of conduct, that is, such conduct as is consistent only with the declarant's holding an opinion adverse to his ownership of the fee simple in the property (*i*).

(*f*) *R. v. Exeter* (1869) L. R. 4 Q. B. 341.

(*g*) *Doe v. Jones* (1808) 1 Camp. 367.

(*h*) See the several cases cited in this chapter.

(*i*) *Gery v. Redman* (1875) 1 Q. B. D. 161.

CHAPTER V.

DYING DECLARATIONS.

WHENEVER a person's death is the subject of a criminal charge, any statement made by the deceased relating to the circumstances from which his death ensues is admissible in evidence, provided that it was made at a time when death was in fact impending and the declarant had himself lost all hope of recovery (*a*). These declarations are thus confined to prosecutions for murder or manslaughter, and are inadmissible on any other issue, even though it should relate to the violence which led to the declarant's death (*b*). The guarantee of their credibility consists in the belief of impending death, which is considered to be a sanction as powerful as that involved in the oath, the declaration being deemed equivalent to the sworn testimony of the living witness (*c*).

If the declarant had any hope, however slight, of recovery, the declaration will be inadmissible. Thus on a trial for murder a written declaration of the deceased made under the following circumstances was tendered in evidence for the prosecution: the declaration had been made on oath to a magistrate's clerk about thirteen hours before death; the clerk asked the deceased before he took down her statement

(*a*) *R. v. Mead* (1824) 2 B. & C. 605; *R. v. Hind* (1860) 29 L. J. M. C. 147; *R. v. Jenkins* (1869) L. R. 1 C. C. R. 187.

(*b*) See *R. v. Lloyd* (1830) 4 C. & P. 233, which was a case of robbery with violence.

(*c*) *R. v. Drummond* (1784) 1 Lea. 337; *R. v. Woodcock* (1788) *ibid.* 500; *Ashton's Case* (1837) 2 Lew. C. C. 147; *R. v. Seafie* (1836) 1 Moo. & Rob. 551.

whether she felt she was likely to die; she said, "I think so—from the shortness of my breath;" her breath was then extremely short; the clerk said, "Is it with the fear of death before you that you make these statements? have you any present hope of your recovery?" She said, "None." The clerk then wrote out her statement and added to it the above conversation in the form of a statement by the deceased, but he omitted the word "present" before "hope." He then read over to the deceased what he had written, and she then added the words "at present" after "hope" and signed the declaration. It was held that the statement was not admissible in evidence, as it did not appear to have been made under a settled hopeless expectation of death, inasmuch as the deceased had expressly qualified the words "no hope" by inserting after them the words "at present" (*d*).

Kelly, C.B., in his judgment said:—

The result of the decisions is that there must be an unqualified belief in the nearness of death, a belief without hope that the declarant is about to die. If we can look at reported cases and at the language of learned judges, we find that one has used the expression "every hope of this world gone" (*e*); another "settled hopeless expectation of death" (*f*); another "any hope of recovery, however slight, renders the evidence of such declarations inadmissible" (*g*). We, as judges, must be perfectly satisfied beyond any reasonable doubt that there was no hope of avoiding death.

Moreover, the declarant's expectation must be that death will follow not ultimately but soon (*h*). This is involved in the very title of these declarations, and it is obvious that if the declarant believed that he would have subsequent opportunities of correcting his declaration the particular guarantee of credibility would be in part removed. It is not necessary

(*d*) *R. v. Jenkins* (1869) L. R. 1 C. C. R. 187.

(*e*) Per Eyre, C. B., *R. v. Woodcock* (1788) 1 Lea. C. C. at p. 502.

(*f*) Per Willes, J., *R. v. Piel* (1860) 2 F. & F. at p. 22.

(*g*) Per Tindal, C. J., *R. v. Hayward* (1833) 6 C. & P. at p. 160.

(*h*) *R. v. Woodcock* (1788) 1 Lea. C. C. 500, 502; *R. v. Crockett* (1831) 4 C. & P. 544; *R. v. Reaney* (1857) D. & B. 151; *R. v. Goddard* (1882) 15 Cox, 7.

that the declarant should have given express utterance to his expectation of death (*i*); it may be inferred from other circumstances, as for instance from the general tenor of the declarant's remarks (*k*), or the obviously dangerous condition in which he lies (*l*). But if once the declarant makes his declaration in the settled expectation of approaching death, neither the fact that he lingers longer than was expected, nor the fact that at some subsequent time he entertains fresh hopes of recovery, will render the declaration inadmissible (*m*).

The declaration must be confined to the circumstances which led to the declarant's death, and to such evidence thereof as the declarant would himself have been competent to give in the witness-box; statements therefore which are founded on hearsay will be rejected (*n*); and if the declarant is too young to understand the idea of a future state the whole declaration will be inadmissible (*o*). It will not however render a declaration inadmissible that it was made in answer to leading questions addressed to the declarant (*p*), although such a mode of taking the declaration may affect its weight.

The declaration may be oral or written, and in any form; statements on oath which do not comply with the conditions requisite to make them admissible as depositions have not unfrequently been proved as dying declarations (*q*).

(*i*) *R. v. Bonner* (1834) 6 C. & P. 386; *R. v. Morgan* (1875) 14 Cox, 337.

(*k*) *R. v. Spilsbury* (1835) 7 C. & P. 187.

(*l*) *R. v. Johns* (1790) 1 Lea. C. C. p. 504, note (*u*); *S. C.*, 1 East, P. C. 357.

(*m*) *R. v. Hubbard* (1881) 14 Cox, 565.

(*n*) *R. v. Sellers* (M.S.) O. B. coram Rooke, J., 1796, Carr. Cr. Law, 3rd ed. 1828, p. 233.

(*o*) *R. v. Pike* (1829) 3 C. & P. 598. In like manner it was held, before 7 & 8 Vict. c. 85, that the declaration of an attainted convict was inadmissible; *R. v. Drummond* (1784) 1 Lea. C. C. 337; see p. 80, note (*d*).

(*p*) *R. v. Fagent* (1835) 7 C. & P. 238; *R. v. Smith* (1865) L. & C. 607.

(*q*) *Cp. R. v. Woodcock* (1788) 1 Lea. C. C. 509; *R. v. Jenkins* (1869) L. R. 1 C. C. R. 187

CHAPTER VI.

DECLARATIONS IN CASES OF VIOLENCE.

THE media of proof which form the subject of this and the next two chapters stand somewhat apart from the rest and have a general resemblance among themselves. They consist of (i) declarations in the nature of complaints made immediately after the infliction of some violence on the declarant and referring to its cause and character, (ii) declarations as to the bodily feelings and state of health of the declarant, and (iii) declarations accompanying and explaining some act of the declarant the legal character whereof is, until its intention is thus revealed, ambiguous and equivocal. The authorities do not appear to agree as to the principle on which these three heads of evidence are admissible. The first has clearly been treated as a medium of proof, the credibility of which depends on the degree of spontaneity with which the declaration is made (*a*). The grounds of admitting the second have not been much canvassed, but it has chiefly been regarded as analogous in character to the first (*b*). The third, on the other hand, has been most frequently spoken of as admissible simply as part of the *res gestæ* (assuming always that the particular act the intent of which is manifested by the declaration is itself one of the *res gestæ*) (*c*).

(*a*) *Thompson v. Trevanion* (1693) Skinn. 402; per Lord Ellenborough, in *Areson v. Kinnaird* (1805) 6 East, at p. 196; but see *ibid.* pp. 193, 194.

(*b*) *Areson v. Kinnaird*, *ibid.* at p. 196, per Lord Ellenborough, C. J.

(*c*) *Robson v. Kemp* (1803) 4 Esp. 233; *Rawson v. Haigh* (1824) 2 Bing. 99; *Lees v. Marton* (1832) 1 Moo. & Rob. 210; *Rouch v. Great Western Rail. Co.* (1841) 1 Q. B. 51; per contra, *semble*, per Parke, B., *Wright v. Doe* (1837) 7 A. & E. at p. 384.

It appears unreasonable however, seeing their very close resemblance to each other, to treat them as admissible on different principles. The test of their true character would seem to be this: does the oral expression of mental and bodily states or feelings stand to those states or feelings in the same relation in which narrative ordinarily stands to the state of facts, past or present, chronicled by it? An almost involuntary expression of present feelings, as the cry which is uttered the instant that a blow is felt, it would be pedantic to regard as narrative; but more deliberate utterances as to the declarant's state of mind or body, especially when that state is already past, it seems more natural to class among the media of proof. This therefore appears to the writer to be on the whole the most appropriate place for these declarations, although it must be admitted that they are so near the dividing line that it is difficult to be confident in determining their true place with reference to the general principle by which narrative and *res geste* are distinguished (*d*).

It follows from what has been said that these declarations do not present a guarantee of credibility with the same clearness as the other declarations which have been discussed.

And lastly it must be noted that these three classes of declarations (as also entries in account books when ordered to be used as *prima facie* evidence) all form exceptions not only to the rule against hearsay, but also to the rule which prohibits a witness from relating his own previous narrative or statement, since their admissibility does not depend on the death of the declarant. It may be doubtful perhaps whether in recent times, since the incompetency of witnesses has been in so many cases abolished, there have been any instances of declarations belonging to classes (ii) and (iii) being admitted in evidence as media of proof, when the

(*d*) See pp. 9—11, and pp. 59—64.

declarant himself either was or could have been called as a witness; but declarations belonging to class (i) are constantly so admitted.

In proceedings instituted in consequence of personal violence it is well settled that the injured person may as part of the *res gestæ* prove the bare fact that after the commission of the injury he made a complaint of it to some other person, omitting both the name of the person complained of and the other terms of the complaint (*e*). But besides this he is sometimes allowed to prove the very terms of the complaint itself, provided that it was made very soon after the commission of the injury, thereby placing before the court, in addition to his present direct evidence, a previous narrative of the occurrence which was first given out of court and behind the back of the person charged. The difference of opinion which has existed as to the principle on which such declarations rest has led to somewhat conflicting views as to the extent to which they are admissible in evidence. Most of the decisions on the matter have been given in criminal proceedings for the commission or attempted commission of rape, but the rule applies equally to other acts of violence and to civil proceedings as well as criminal (*f*).

According to one view evidence of the terms of the complaint is admissible whenever it was made immediately after the hurt received and before the injured person had time to devise or contrive anything for his own advantage (*g*). In this view the narrative thus given out of court is regarded as an independent medium of proof of the act of violence,

(*e*) For this, see the cases of *R. v. Clarke* (1817) 2 St. 241; *R. v. Walker* (1839) 2 M. & Rob. 212; and all the cases cited below in this chapter.

(*f*) *R. v. Foster* (1834) 6 C. & P. 325, was a case of manslaughter; *Thompson v. Trevanion* (1693) Skin. 402, was a civil action.

(*g*) *Ibid.*; and *R. v. Eyre* (1860) 2 F. & F. 579; and *R. v. Wood* (1877) 14 Cox, 46.

the test of its credibility and admissibility being its spontaneity, and the injured person is entitled to prove the terms of his complaint as part of his evidence in chief; and if he should not himself appear as a witness, evidence of the complaint may nevertheless be given by the person to whom it was made, or anyone who heard it (*i*).

According to another view evidence of the terms of the complaint is only admissible in confirmation of the injured person's direct evidence in the witness-box of the injury suffered (*k*). In this view of the case, if such person should neglect or be unable to give direct evidence of the injury, no evidence whatever can be given of the terms of the complaint (*l*); and, strictly speaking, it would follow that such evidence would be superfluous where, although he appears to give evidence of the injury, his account of the matter is not questioned in cross-examination or otherwise. If on the other hand it is so questioned, he would at once be at liberty both himself to prove the terms of the complaint and to call as a confirmatory witness any person to whom, or in whose hearing, it was made (*m*). In this view the terms of the complaint are admissible not as an independent medium of proof, but solely as a special mode of confirming the credibility of the witness.

Yet a third opinion on the matter, intermediate between the foregoing, is this, that it may be proved that a complaint was made (the name of the person complained of and the other particulars of the complaint being suppressed as above mentioned), and that it may then be further proved that *in*

(*i*) As in *Thompson v. Trevanion* (1693) Skin. 402, where the wife could not be called by reason of her incompetency from interest, and in *R. v. Foster* (1834) 6 C. & P. 325, where the injured person was dead.

(*k*) *R. v. Megson* (1840) 9 C. & P. 420; *R. v. Gutteridge*, *ibid.* 471.

(*l*) As in *R. v. Megson* (1840) 9 C. & P. 420, where the injured person was dead; *R. v. Gutteridge*, *ibid.* 471, where the injured person did not appear to give evidence; and *R. v. Nicholas* (1846) 2 C. & K. 246, where the child injured does not appear to have given evidence.

(*m*) *Semble, R. v. Osborne* (1842) Car. & M. 622.

consequence of such complaint the person to whom it was addressed charged or arrested the defendant (*n*). This appears to be an indirect way of proving part of the terms of the complaint under the guise of confining the evidence to the *res gestæ* alone, and its subtlety has been the subject of adverse criticism (*o*).

It cannot be said that the rule of law or the practice upon this matter is finally settled, but on the whole the balance of authority appears to be in favour of the first of the three views set forth above (*p*.) If that be so, the person who made the complaint, or any person who heard it made, should be admitted to prove its terms in the first instance as part of his or her evidence in chief upon the issue, if in the opinion of the judge it was made so soon after the time of the alleged violence as to indicate that it was probably genuine and not invented; and the rule will therefore not only form an exception to the rule which prohibits a witness from giving in evidence a former narrative of a fact in issue, but will, so far as the evidence of any other person than the injured person is concerned, also form an exception to the other rule which prohibits hearsay evidence.

(*n*) *R. v. Wink* (1834) 6 C. & P. 397.

(*o*) *R. v. Osborne* (1842) C. & M. 622.

(*p*) Against this view are Rolfe, B. (*R. v. Megson*), Cresswell, J. (*R. v. Osborne*), and Pollock, C. B. (*R. v. Nicholas*). For it are Holt, C. J. (*Thompson v. Trevanion*), Byles, J. (*R. v. Eyre*), and Bramwell, L. J. (*R. v. Wood*). Besides these may be urged in its favour the decision, in *R. v. Foster*, of Gurney, B., Park, J., and Patteson, J. (qualified as to Patteson, J., by his decision in *R. v. Wink*), the strong protest of Parke, B., in *R. v. Walker*, which can hardly be deemed qualified by his decision in *R. v. Gutteridge*, and, finally, the fact that the last two cases in order of time have affirmed the principle as it was originally laid down by Holt, C. J.

CHAPTER VII.

DECLARATIONS AS TO STATE OF HEALTH.

THE general character of this head of evidence has been already referred to in the last chapter (*a*).

Whenever there is a question as to the state of health at a particular time of some person who has since died, the statements of such person at that time or soon afterwards with regard to his bodily feelings and symptoms are admissible in evidence. Thus in an action by the plaintiff upon a policy of insurance that had been granted to him by the defendants upon his wife's life the question was whether the warranty contained in the policy, that the wife at the time when it was effected was in good health, was true. The defendants in support of their plea that the warranty was false called a witness, Susannah Lees, who had visited the deceased woman a few days after the date on which she had procured her certificate of good health for the purpose of the policy, in order to prove certain statements which the deceased had made to her regarding herself. The witness, whose evidence was admitted after objection, stated that she found the plaintiff's wife in bed at eleven o'clock in the forenoon, that the latter stated that she was very poorly, that she had been to Manchester a day or two before, that her husband had been insuring her life, that she was not well nor fit to go when she went, that it would be ten days before the policy could be returned, and that she was afraid she could not live till it was made, and her husband could not get the

(*a*) See above, pp. 142—144.

money. It was held by the court, on an application for a new trial on the ground of misreception of evidence, that it had been properly admitted (*b*). So where the prisoner was indicted for poisoning her husband, in order to prove the state of health of the deceased a few days prior to the day of his death a witness was called who had seen him about that time, for the purpose of proving a conversation which had then taken place between himself and the deceased with regard to the latter's state of health at that time. The evidence was objected to, but the objection was overruled (*c*).

This exception has sometimes been spoken of as part of the *res gestæ* (*d*), but the leading case would seem to show that it is admitted as a medium of proof, and that the guarantee of its credibility consists in the spontaneity of the declaration (*e*). In any view it would seem that such statements are only admissible when they are contemporaneous with, or closely follow, the symptoms to which they relate. In *Aveson v. Kinnaird* (*f*) the symptoms described extended back over several days, but the illness was continuous and severe; in the case of *R. v. Johnson* (*g*) the declaration would seem to have had relation to contemporaneous symptoms.

There seems to be no ground for confining the admissibility of such declarations to cases where the declarant is dead. The opinion that they are part of the *res gestæ* could hardly have been put forward at all if such a limitation existed.

(*b*) *Aveson v. Kinnaird* (1805) 6 East, 188.

(*c*) *R. v. Johnson* (1847) 2 C. & K. 354.

(*d*) *Doc v. Ridgway* (1820) 4 B. & A. 53, 55; cp. 6 East, 193, 194.

(*e*) *Aveson v. Kinnaird*, at p. 196; but see *ibid.* pp. 193, 194.

(*f*) (1847) 2 C. & Kir. 354.

(*g*) *Supra*.

CHAPTER VIII.

DECLARATIONS ACCOMPANYING ACTS.

THE general character of this head of evidence has been already referred to in the last chapter but one (*a*).

When it is relevant to prove that some act was done with a particular intent, on which its true legal character depends, declarations made by the person doing it, either at the time or immediately afterwards, have frequently been held admissible to prove what that intent was (*b*). Thus where questions arise concerning domicile (which consists in the fact of a person's residence in a particular place with the intention that it shall be his home), declarations made by the person so residing as to his intention to stay or remove are admissible (*c*). Again, where the plaintiffs sued the defendant for the loss occasioned by supplying goods to one Duffy in consequence of representations as to his character which the defendant had made, it was held that evidence might be given on behalf of the plaintiffs that they had been heard to say when they supplied Duffy with the goods that they did so in consequence of the favourable account which the defendant had given of him (*d*). So where questions have arisen as to whether a person has been keeping house or absenting himself with the intent to hinder or defraud his creditors,

(*a*) See pp. 142—144.

(*b*) *Wright v. Doe* (1837) 7 A. & E. 313, 361, 384.

(*c*) *Hodges v. Beauchesne* (1858) 12 Moo. P. C. 285, 325; *Doucet v. Geoghegan* (1878) 9 Ch. D. 441.

(*d*) *Fellowes v. Williamson* (1829) M. & M. 306.

and has so committed an act of bankruptcy, it has always been held that statements contemporaneous with the act or made shortly afterwards by the alleged bankrupt might be given in evidence by his trustees in proof of the act of bankruptcy (*e*); and the same has been held where the question was whether an assignment which a bankrupt had made constituted a fraudulent preference (*f*).

In a case where the question was whether a conveyance which contained, as part of the description of the parcels granted, the words "the common piece on the Mind" had operated to convey to the plaintiff's predecessor in title a certain piece of land which the plaintiff claimed, the plaintiff tendered in evidence an oral statement made by the person who had sold the land to his predecessor in title at the time of the conveyance. The vendor and the purchaser had gone over the ground together, and the vendor had pointed out to the purchaser the particular piece of land now claimed by the plaintiff as being "the common piece on the Mind" which he was purchasing. The evidence was received, and its reception was afterwards upheld by the court, as a declaration accompanying an act (*g*). If the declaration had been tendered merely for the purpose of showing where and what the land known as the "common piece on the Mind" was, it could hardly have been held admissible; but it seems to have been admitted rather on the supposition that the conveyance of *some* property known by that particular description could be regarded as an ambiguous act on the part of the vendor which might be explained by proof of his intention at the time of the grant. On the other hand, where the plaintiff sued for infringement of patent, and the defence was

(*e*) *Bateman v. Bailey* (1794) 5 T. R. 512; *Rawson v. Haigh* (1824) 2 Bing. 99; *Newman v. Stretch* (1829) M. & M. 338.

(*f*) *Ridley v. Gyde* (1832) 9 Bing. 349; approved in *Rouch v. G. W. Rail. Co.* (1841) 1 Q. B. 51.

(*g*) *Parrott v. Watts* (1877) 47 L. J. C. P. 79.

want of novelty by reason of one Oatley having before the date of the patent sold products similar to that produced by the plaintiff's patent, the plaintiff tendered evidence of a statement of the said Oatley, who was not himself called, made at the time of his selling a small portion of such product, to the effect that it was new and that he wished it to be kept secret. But it was held that such evidence was inadmissible, as neither the nature, object nor motives of Oatley's act in selling the product were in any way the subject of the inquiry (*h*).

It has often been said that the true ground on which these declarations are admitted is that they constitute part of the *res geste* (*i*). Reasons have been submitted for thinking that this view is not in harmony with the general principle of similar exceptions (*k*), and such would seem to have been the later view of Parke, B., as indicated in his considered judgment in the case of *Wright v. Doe* (*l*).

The declaration must be contemporaneous with or closely follow the act which it is said to accompany. It has been held that even the interval of a few hours is sufficient to render it inadmissible (*n*). It is true that in one case (*n*) a declaration was admitted which was separated by an interval of nearly four weeks from the act which it qualified; but although this decision was subsequently approved (*o*), it is safer to regard it as exceptional in its circumstances, and therefore not to be followed as a general precedent.

(*h*) *Hyde v. Palmer* (1863) 32 L. J. Q. B. 126.

(*i*) *Robson v. Kemp* (1803) 4 Esp. 233; *Rawson v. Haigh* (1824) 2 Bing. 99; *Lees v. Marton* (1832) 1 Moo. & Rob. 210; *Rouch v. G. W. Rail. Co.* (1841) 1 Q. B. 51.

(*k*) Page 143.

(*l*) (1837) 7 A. & E. 313, 384.

(*m*) *Lees v. Marton* (1832) 1 Moo. & Rob. 210; cf. *Rawson v. Haigh* (1824) 2 Bing. 99, 103, 104.

(*n*) *Ridley v. Gyde* (1832) 9 Bing. 349.

(*o*) *Rouch v. Great Western Rail. Co.* (1841) 1 Q. B. 51.

There is one very anomalous head of hearsay evidence, which may be referred to here, as perhaps coming nearer to this class of declarations than to any other. It consists of the declarations, and conduct equivalent to declarations, of wife (*p*) or paramour (*q*) as to the legitimacy or illegitimacy of offspring of the wife, held to be admissible when the question in issue is whether such offspring is or is not legitimate.

(*p*) *Aylesford Peerage* (1885) 11 App. Ca. 1.

(*q*) *Burnaby v. Baillie* (1889) 42 Ch. D. 282.

CHAPTER IX.

DECLARATIONS AND REPUTATION AS TO MARRIAGE.

§ 1. *Declarations as to Marriage.*

§ 2. *Reputation as to Marriage.*

MARRIAGE is a status which here and in most countries can only be validly created by a contract executed in accordance with certain prescribed formalities. But on grounds of policy it is well settled that it is not essential to its proof to show that all the requisite formalities have been complied with. In all cases, save where the proof of the marriage is essential to the establishment of a criminal charge, as that of bigamy, a marriage may be proved by the declarations of the parties, and their conduct to each other, and also by that general recognition and reputation of their marriage among those who know them which is consequent thereon (*a*).

The weight of such declarations or reputation may be affected by the absence of evidence to show that the prescribed formalities were complied with, but the Marriage Acts which prescribe them were not intended to displace or otherwise alter the proof of marriage by these means (*b*). The presumption in favour of a valid marriage, where these cir-

(*a*) *Leader v. Barry* (1795) 1 Esp. 353; *Morris v. Miller* (1767) 1 W. Bl. 632; *Doe v. Fleming* (1827) 4 Bing. 266; cp. *Hoggan v. Craigie* (1839) Mac. & Rob. 942, 965; *Breadalbane Case* (1867) L. R. 1 Sc. App. 182, 211.

(*b*) *Read v. Passer* (1795) Pea. 230; *St. Devereux v. Much Dew Church* (1762) 1 W. Bl. 367.

circumstances occur, is so strong that it can only be rebutted by clear proof that no marriage in fact took place (*c*).

The rule embraces both the declarations and conduct of the particular parties and also the general reputation which is gradually founded on it. The first of these two heads of evidence is almost invariably, though not necessarily and in all circumstances, accompanied by the second. But as their characteristics differ it will be convenient to discuss them separately.

§ 1.—Declarations as to Marriage.

The statements and conduct of the parties, implying the legality of their union and the legitimacy of their children, have sometimes been regarded upon an issue of marriage or no marriage as *res gestæ* (*d*). But inasmuch as such statements and conduct are admissible although they may have taken place long after the date of the marriage, it appears difficult to reconcile this view with the ordinary meaning of *res gestæ*. Moreover this head of evidence is so closely connected with declarations, express and by conduct, in pedigree cases, as well as with evidence of reputation, both of which have always been considered as media of proof, that it seems most consistent with principle to treat of it in this place.

When the parties to the alleged marriage are deceased, their conduct towards each other and towards their children has constantly been admitted as evidence of marriage and legitimacy respectively (*e*).

Such evidence may consist of the terms in which the parties have spoken or written to or of each other and their children

(*c*) *Piers v. Piers* (1849) 2 H. L. C. 331, 362; cp. *Hervey v. Hervey* (1773) 2 W. Bl. 877.

(*d*) *Dysart Peerage* (1881) 6 App. Ca. 489, 499—504; per contra, see judgment in *Hervey v. Hervey*, *supra*.

(*e*) *Piers v. Piers* (1849) 2 H. L. C. 331; *Goodman v. Goodman* (1859) 28 L. J. Ch. 745; *Lyle v. Ellwood* (1874) 19 Eq. 98; *Collins v. Bishop* (1878) 48 L. J. Ch. 31.

either in conversation, in letters, in documents of title, on solemn occasions, as in the witness-box or on registering a birth or a death, or in any other circumstances. Evidence of this description is equivalent to a continuing assertion of the legal character of the relationship between them, and closely resembles the declarations by parents as to the legitimacy or illegitimacy of their children referred to in the next chapter (*f*).

But this head of evidence is not confined, like declarations as to pedigree, to cases where the parties are dead. The evidence is equally admissible although one or both of them should be living; the fact that in such cases more direct proof of the celebration of the marriage is not forthcoming affects the weight, not the admissibility, of the evidence. Thus on a prosecution for bigamy the defendant, a woman, was charged with having married one Gotobed in 1848, and afterwards in 1858, while he was still living, having married another man named Wilson. The defence was that at the time of the marriage in 1848 Gotobed was already married to another woman named Guy who was then alive. The evidence of this marriage, which appears to have been received without objection, was as follows: a witness was called who had known Gotobed at Toronto in Canada in 1837 and for several years subsequently, and who remembered him returning about the year 1843 to Toronto, after a temporary absence, accompanied by the woman Guy. Gotobed then stated to him that this woman was his wife; he treated her as such, and everyone else regarded her in that capacity (*g*). In this case it will be noted that both parties to the marriage which was thus proved were strangers to the proceedings in which the evidence was given, and it would seem that at the time of the prosecution Gotobed was still living. The

(*f*) See below, p. 162.

(*g*) *R. v. Wilson* (1862) 3 F. & F. 119.

evidence however is equally admissible on behalf of the husband or wife when he or she is a party to the record. Thus in an action of debt in 1847, where the defence was that the defendant was a married woman, the defendant was allowed to call evidence to prove that she had for a period of several years lived as wife with a person named Potts, who was still living, and had passed under the name of Mrs. Potts (*h*).

These cases must be distinguished from those where the husband or wife is a party to the record and such evidence is tendered against him or her by way of an admission (*i*).

§ 2.—Reputation as to Marriage.

Reputation here means the opinion of relatives, friends, and neighbours, that the parties are, as their conduct imports, a married couple. It must not be merely the opinion of A and B in favour of the marriage, opposed perhaps to a contrary opinion entertained by C and D, but must be general in its character (*k*). It is not however necessary that the reputation should be unanimous in order to be admissible; the marriage may be established by a clear preponderance of reputation in its favour (*l*).

It may be proved by any witness who from his residence in the place where it exists, or his connection with the family or other circumstances, can prove the tenor of it from his own direct personal knowledge. So soon as a witness admits that he is only speaking from information given to him by some third person his evidence becomes inadmissible (*m*). If how-

(*h*) *Woodgate v. Potts* (1817) 2 C. & K. 457; cp. *De Thoren v. Att.-Gen.* (1876) 1 App. Ca. 686.

(*i*) *Munro v. De Cheminant* (1815) 4 Camp. 215; cp. *Wilson v. Mitchell* (1813) 3 Camp. 393; *R. v. Flaherty* (1847) 2 C. & K. 782.

(*k*) *Cunninghams v. Cunninghams* (1814) 2 Dow 482, 511, 514.

(*l*) *Lyle v. Ellwood* (1874) 19 Eq. 98.

(*m*) *Shedden v. Att.-Gen.* (1860) 30 L. J. P. M. & A. 217, 231, 232.

ever a witness merely says, "I heard that A and B were man and wife," and is not cross-examined as to the meaning or source of his statement, it may be presumed that it is founded on a reputation held by himself in common with others (*n*).

This evidence, like that of cohabitation, is not confined to cases where the parties are deceased; it is admissible while they are living when they are strangers to the proceedings (*o*), and seems to be equally admissible on principle where one of them is a party, subject to the qualification mentioned above in the case of criminal charges (*p*).

(*n*) *Evans v. Morgan* (1832) 2 C. & J. 453.

(*o*) *Doe v. Fleming* (1827) 4 Bing. 266.

(*p*) See p. 153.

CHAPTER X.

DECLARATIONS AS TO PEDIGREE.

UPON questions of pedigree the statement of a deceased person, whether based on his own personal knowledge or on family tradition, is admissible in evidence, provided that the declarant is proved to be related to the person about whose family relations the statement is made and that the declaration was made *ante litem motam*.

This exception is due to the frequent difficulty from lapse of time of proving family relationships by means of direct oral evidence or any other medium of proof than the hearsay handed down by members of the family (*a*). The guarantee of its credibility is said to consist in the fact that the declaration was the natural effusion of one who had peculiar opportunity and interest as a member of the family to state correctly matters relating to its genealogy, and that it was made upon an occasion when his mind stood even without bias to exceed or fall short of the truth (*b*).

A pedigree ordinarily means a simultaneous statement of a succession of births, marriages and deaths making up a family genealogy; but a pedigree case or question arises within the meaning of this rule whenever there is an issue as to the fact or degree of relationship between any two persons. And relationship here comprehends not only

(*a*) *Higham v. Ridgway* (1808) 10 East, 109, 120; *Fowles v. Young* (1806) 13 Ves. 140, 143; *Sturla v. Freccia* (1880) 5 App. Ca. 623, 641; *Dysart Peerage* (1881) 6 App. Ca. 489, 503.

(*b*) *Whitelock v. Baker* (1807) 13 Ves. 511, 514; *Monckton v. Att.-Gen.* (1831) 2 Russ. & Myl. 147, 159; *Berkeley Peerage* (1811) 4 Camp. 401, 406.

relationship in the popular sense by consanguinity or affinity, but also any legal relationship such as heirship to which specific rights are incident connected with the devolution of property. Moreover since the proof of a particular relationship often depends on the proof of some specific fact, such as the date of some particular birth, marriage or death, or some incident connected therewith, or the place of residence of some particular person or family, these facts are also regarded as matters of pedigree within the meaning of the rule when they thus tend to prove a relationship which is in question (*c*). Thus where in an administration action the question was whether two children were legitimate, declarations contained in letters of their reputed father, since deceased, stating their exact ages and thereby making it clear that they must have been born before the date of his marriage, were admitted to prove their illegitimacy (*d*). In an action of ejectment the case was this: three brothers, Stephenas, Fortunatus and Achaieus had been born at one birth. Stephenas died without issue. The plaintiff claimed through Fortunatus, and the question was whether he or Achaieus was born first. The plaintiff tendered in evidence declarations by the father to the effect that Achaieus was the youngest of the three and that he had taken these names from St. Paul's Epistles (*e*); also declarations of a deceased relative of the family, one M. F., made shortly after the birth, to the effect that she was present at the birth, and upon the birth of the second child had taken a string and tied it round its arm to distinguish it (*f*). So declarations have been admitted to

(*c*) *Monckton v. Att.-Gen.* (1831) 2 Russ. & Myl. 147, 156; *Betty v. Nail* (1856) 7 Ir. C. L. 17.

(*d*) *Re Turner* (1885) 29 Ch. D. 985. Cp. *Kidney v. Cockburn* (1831) 2 Russ. & My. 167; cp. *Herbert v. Tuckal* (1663) T. Raym. 84, cited in *Roe v. Rawlings* (1806) 7 East, 279, 290; and commented on in *Haines v. Guthrie* (1884) 13 Q. B. D. 818, 822.

(*e*) 1 Cor. ch. 16, v. 17.

(*f*) Vin. Abr. Ev. T. b. 91.

prove that a person of a particular name was resident in a particular place when that fact was relevant for the purpose of proving a step in a genealogy (*g*). On the other hand, neither the relationship between different persons, nor the dates of their births, marriages or deaths can be established by this medium of proof, where the question in issue is not one of pedigree within the meaning of this rule (*h*). Thus in an action by reversioner against tenant for the term of three lives for use and occupation of the land after the alleged expiration of the lives, the question was whether one of the *cestuis que vie* was dead; it was held that the reputation which existed upon that point in his family was not admissible, the question not being one of genealogy (*i*). And in an action for goods sold and delivered, to which the defence of infancy was pleaded, the date of the defendant's birth being in question, it was held that a declaration made by his deceased father was not admissible in evidence (*k*). And declarations tending to prove the place of birth have been rejected on the same grounds (*l*).

Before a declaration tending to prove relationship between two persons can be given in evidence it is necessary to prove by some means other than the declaration itself that the declarant is related to one of those two persons, since otherwise it would be possible for a stranger by merely claiming alliance with a family to put himself in a position to affect the rights of its members (*m*). But it is not necessary to prove that he is related to them both, for this would involve the absurdity of requiring proof of the very question in issue

(*g*) *Rishton v. Nesbit* (1844) 2 Moo. & Rob. 554; *Shields v. Boucher* (1846) 1 De G. & Sm. 40.

(*h*) *Haines v. Guthrie* (1884) 13 Q. B. D. 818.

(*i*) *Whittuck v. Waters* (1830) 4 C. & P. 375.

(*k*) *Haines v. Guthrie* (1884) 13 Q. B. D. 818; cp. *Figge v. Wedderburn* (1842) 6 Jur. 218.

(*l*) *R. v. Erith* (1807) 8 East, 539.

(*m*) *Monckton v. Att.-Gen.* (1831) 2 Russ. & Myl. 147; *Doe v. Randall* (1828) 2 Moo. & P. 20, 24.

as a preliminary to giving the evidence which is tendered to prove it (*u*). The relationship of the declarant which has thus to be proved must be a legitimate one, but there is no limit as to its remoteness; and for the purpose of this rule husband and wife are deemed to be related to each other (*o*). Hence the husband is a competent declarant in regard to his wife's family (*p*), and the wife in like manner in regard to her husband's (*q*); but the rule excludes the declarations not only of those who are connected by illegitimate ties with the family to which the declaration relates (*r*), but also of friends or dependents, however intimate (*s*). The preliminary proof of this relationship must be such as to satisfy the judge on whose decision the admissibility of the evidence depends, and will not necessarily be of such a strict character as would be requisite for the proof of a fact in issue.

Where the question in issue happens to be the relationship of the declarant himself to some other person, the following problem arises: is the question to be deemed to be a question as to the declarant's family only, or as to the other person's family only, or as to the family of both? If it is deemed to be a question relating to the declarant's family only, then his declaration must be admissible forthwith; for to speak of preliminary evidence to prove that he is related to himself would be absurd. Again if it is deemed to be a question relating to both families, which seems to be the true account of the matter, on the principle laid down in *Monckton v. The Attorney-General* (*t*), the party tendering the evidence

(*u*) *Monckton v. Att.-Gen.* (1831) 2 Russ. & Myl. 147, 156, 157.

(*o*) *Davies v. Lowndes* (1843) 7 Sc. N. S. 141, 181; *Shrewsbury Peerage* (1857) 7 H. L. 1, 23.

(*p*) *Doe v. Harvey* (1825) Ry. & Moo. 297; *Fowles v. Young* (1806) 13 Ves. 140.

(*q*) *Shrewsbury Peerage* (1857) 7 H. L. 1, 23, 26.

(*r*) *Doe v. Barton* (1837) 2 Moo. & Rob. 28.

(*s*) *Johnson v. Lawson* (1824) 2 Bing. 86.

(*t*) (1831) 2 Russ. & Myl. 147, 156, 157.

should be free to treat the declaration as one relating to the declarant's family, and, as before, to tender the declaration forthwith. It is only on the strained hypothesis of regarding the declaration as relating solely to the family of the other party that it can become necessary to tender evidence of the declarant's relationship to such other person as a condition precedent to the admissibility of the declaration. The cases however present on this matter a strange diversity of opinion.

Thus it has always been held that the declarations of a deceased father or mother are admissible to prove the legitimacy or illegitimacy of their children (provided that they do not contravene the rule which prohibits on grounds of public policy their giving evidence of non-access after marriage), as, for instance, by proving that the children were born before the date of the marriage (*u*), or by disproving the existence of any marriage at all (*x*). In like manner declarations have been admitted to prove that a particular person is the sister of the declarant (*y*). In this case it was expressly held that no evidence could be necessary to connect the declarant with her own family. It will be noticed that this decision involves the admissibility of declarations as to the marriage of the declarant's parents and the declarant's own legitimacy. So declarations have been admitted to prove that the declarant himself is illegitimate and has no relatives whatever, without apparently any preliminary proof being required as a condition of admitting the declaration (*z*).

On the other hand there are several cases in which, perhaps sometimes without discussion as to the necessity of such preliminary evidence, the court has clearly proceeded on the assumption that, in some cases at any rate, before a

(*u*) *Goodright v. Moss* (1777) 2 Cowp. 591; *Re Turner* (1885) 29 Ch. D. 985.

(*x*) *Murray v. Milner* (1879) 12 Ch. D. 845.

(*y*) *Smith v. Tebbitt* (1867) L. R. 1 P. & D. 354.

(*z*) *Proc.-Gen. v. Williams* (1862) 31 L. J. P. M. & A. 157.

declaration is admissible to prove the relationship of some other person to the declarant, preliminary evidence thereof, independent of the declaration itself, must first be given. Thus it has been held that a declaration as to the declarant's own legitimacy is admissible after some *prima facie* evidence of that fact has first been given, and that it is no objection to the preliminary decision by the judge of this question that it is the very question in issue in the case (*a*). So it has been held that a declaration to the effect that the declarant was legally married is not admissible until some preliminary proof of the marriage has been given (*b*). In one case the court has held that a declaration stating that a particular person was the illegitimate son of the declarant's brother was inadmissible, on the ground apparently that the declaration related to the family of the illegitimate son to whom the declarant had no legal relationship and not to that of his father (*c*); but this case seems irreconcilable with the other authorities.

The declaration must have been made *ante litem motam* (*d*). The mere existence of the situation out of which the dispute subsequently arises does not render a declaration inadmissible; nor on the other hand is actual litigation necessary to exclude it; but so soon as a controversy has actually arisen which would naturally create a bias in the mind of one standing in the relation of the declarant, all subsequent declarations become inadmissible (*e*); and it is immaterial

(*a*) *Doe v. Davies* (1847) 10 Q. B. 314; *Hitchins v. Eardley* (1871) L. R. 2 P. & D. 248; cp. *Berkeley Peerage* (1811) 4 Camp. 401, 403. See form of questions, p. 403, and per Lord Mansfield, 416.

(*b*) *Proc.-Gen. v. Williams* (1862) 31 L. J. P. M. & A. 157.

(*c*) *Crispin v. Doglioni* (1863) 32 L. J. P. M. & A. 109.

(*d*) *Berkeley Peerage Case* (1811) 4 Camp. 401; *Monekton v. Att.-Gen.* (1831) 2 Russ. & Myl. 147.

(*e*) *Monekton v. Att.-Gen.*, at p. 160; *Shedden v. Att.-Gen.* (1860) 30 L. J. P. M. & A. 217, 235. For good illustrations of what constitutes *litis contestatio* see *Butler v. Mountgarrett* (1856) 6 Ir. C. L. 77; 7 H. L. Ca. 633; *Frederick v. Att.-Gen.* (1874) L. R. 3 P. & D. 270.

whether the declarant is or is not aware of the controversy (*f*). But declarations made before any dispute has arisen, although with the express view of precluding controversy, are not on that account inadmissible (*g*). Hence it has been held that depositions made for the purpose of another suit are inadmissible if the same point was in issue (*h*), but otherwise not (*i*). But the previous controversy, to render the declaration inadmissible, must have been on precisely the same point (*k*).

It is not necessary that the declaration should contain only matters within the personal knowledge of the declarant. They may be based on statements made to him by a relative who has such personal knowledge (*l*), or they may be based on tradition involving any number of degrees of hearsay so long as it is the tradition of deceased members of the family and not of strangers (*m*). But it is not necessary that the declaration should state with exactitude the degree of relationship; its failure to do so will affect its weight and not its admissibility (*n*). Nor that the evidence should have any greater precision than the case fairly admits of; thus in an action of ejectment, where the question was whether, as the plaintiff alleged, one Thomas Griffin had died without issue, the plaintiff called an elderly lady, one of the family, to prove that Thomas had many years before, when a young man, gone abroad and according to the repute of the family had afterwards died in the West Indies, and that she had

(*f*) *Berkeley Peerage* (1811) 4 Camp. 401, 417.

(*g*) *Ibid.*; and *Goodright v. Moss* (1777) 2 Cowp. 591.

(*h*) *Berkeley Peerage* (1811) 4 Camp. 401, questioning *Goodright v. Moss* (1777) 2 Cowp. 591.

(*i*) See *Lyle v. Ellwood* (1874) 19 Eq. 98.

(*k*) *Shedden v. Att.-Gen.* (1860) 30 L. J. P. M. & A. 217, 236.

(*l*) *Doe v. Davies* (1847) 10 Q. B. 314.

(*m*) *Goodright v. Moss* (1777) 2 Cowp. 591, 594; *Whitelock v. Baker* (1807) 13 Ves. 511, 514; *Monekton v. Att.-Gen.* (1831) 2 Russ. & Myl. 147, 164, 165.

(*n*) *Fowles v. Young* (1806) 13 Ves. 140, 147.

never heard in the family of his having been married. It was held by the court, upon an application for a new trial, that this was evidence upon which the jury were entitled to find that Thomas had died unmarried (*o*). But if, instead of being founded on family hearsay or tradition, the declaration is extracted solely from different documents which are not produced, it will be inadmissible, since it is no more than a reproduction of documents which might indeed be good evidence of reputation themselves, but ought for that purpose to be produced in court (*p*).

It follows from what has been said that such declarations are equally admissible whether they are brought home to a particular member of the family or are shown to have been recognized and adopted by the family generally. They may moreover be in any form, either oral or by conduct or in writing. Examples of declarations by conduct are where a parent regularly treats a child as legitimate (*q*), or as illegitimate (*r*), as where he says that he does not regard him as a member of his family and omits all mention of him in his will (*s*). Written declarations may be contained in letters (*t*), wills (*u*), deeds (*x*), family bibles, or any other book or paper (*y*). Inasmuch as the family bible is in the nature of a family record to which all the members of the family have access, the entries contained in it are admissible as declarations even though their handwriting cannot be proved, on

(*o*) *Doe v. Griffin* (1812) 15 East, 293.

(*p*) *Davies v. Lowndes* (1843) 6 M. & G. 471; overruling *S. C.* 5 Bing. N. C. 161.

(*q*) *Berkeley Peerage* (1811) 4 Camp. 410, 416.

(*r*) *Goodright v. Moss* (1777) 2 Cowp. 591.

(*s*) *Robson v. Att.-Gen.* (1842) 10 Cl. & F. 471, 498, 499.

(*t*) *Re Turner* (1885) 29 Ch. D. 985; *Butler v. Mountgarret* (1856) 6 Ir. C. L. 633.

(*u*) *Murray v. Milner* (1879) 12 Ch. D. 845; *Doe v. Pembroke* (1809) 11 East, 504.

(*x*) *Smith v. Tebbitt* (1867) L. R. 1 P. & D. 354.

(*y*) *Berkeley Peerage* (1811) 4 Camp. 401, 417.

the ground of its general recognition as a family record (*z*). And it is on the same ground that the courts have treated as declarations pedigrees or portraits hung up in family mansions, and statements contained on tombstones or monumental brasses (*a*).

(*z*) *Hubbard v. Lees* (1866) L. R. 1 Ex. 255, 258.

(*a*) *Goodright v. Moss* (1777) 2 Cowp. 591; *Monckton v. Att.-Gen.* (1831) 2 Russ. & Myl. 147, 163; *Slaney v. Wade* (1836) 7 Sim. 595.

CHAPTER XI.

REPUTATION AS TO PUBLIC AND GENERAL RIGHTS.

§ 1.—*Reputation.*

§ 2.—*Presentments of Customary Courts.*

§ 3.—*Verdicts, Judgments, and Depositions.*

§ 1.—*Reputation.*

UPON any issue as to the existence of a public or general right the statements of persons who were interested in such right and have since died are admissible in evidence although based on hearsay and tradition of others who came before them and were also interested, provided that such statements are an expression of the common opinion and report of those concerned in the matter, that they state a general conclusion and not a particular fact, and that they were made before the controversy arose in which it is sought to make use of them. This exception therefore involves the admission of hearsay to any number of degrees: not only does the witness who brings the evidence into court state that which another person, the declarant, has said, but the declarant's own statement must also embody not his own individual knowledge or belief alone but also the concurring opinions of others similarly interested to himself; and these opinions in their turn may be based in part on earlier traditions extending back through any number of generations. This is what is understood in this connection by the term reputation: the common hearsay of those interested in handing down from one to another the tradition of a right, the origin of

which can no longer be proved by direct oral evidence (*a*). And such evidence is of course equally admissible to affirm or to refute an alleged right of this description (*b*). The guarantee of its credibility consists in the concurrence of a large number of persons all interested, and therefore likely to ascertain the truth, in an opinion which if untrue would be surely challenged (*c*).

Public rights are those in which all the subjects of the Queen are interested, as for instance rights of highway (*d*), of taking tolls on the highway (*e*), of landing on a river bank (*f*), of using ports, ferries, and the like. General rights are those in which some class of the community has a common interest, as for example, those which are based on the customs of manors (*g*), parishes (*h*), or cities (*i*), or which are connected with the boundaries of counties (*k*), hamlets (*l*) and manors or the ancient divisions of manors (*m*).

When it is said that the persons from whom the reputation proceeds must be interested, this means that they must be either entitled to enjoy or liable to submit to the right in question, or that they must be so situated that their material interests may be affected by its exercise, or that in some other respect they are so concerned with such right that it may be presumed that they had both the means and the

(*a*) *Higham v. Ridgway* (1808) 10 East, 109, 120.

(*b*) *Drinkwater v. Porter* (1835) 7 C. & P. 181.

(*c*) *Wright v. Doe* (1837) 7 A. & E. 313, 360, 361; in H. L. 4 Bing. N. C. 489, 528; *R. v. Bedfordshire* (1855) 4 E. & B. 535, 542.

(*d*) *Read v. Jackson* (1801) 1 East, 355; *R. v. Bliss* (1837) 7 A. & E. 550.

(*e*) *Brett v. Beales* (1829) M. & M. 416.

(*f*) *Drinkwater v. Porter* (1835) 7 C. & P. 181.

(*g*) *Doe v. Sisson* (1810) 12 East, 62; *Crase v. Barrett* (1835) 1 C. M. & R. 919.

(*h*) *Berry v. Banner* (1793) Pea. 156.

(*i*) *Layborn v. Crisp* (1838) 4 M. & W. 320.

(*k*) *Evans v. Rees* (1839) 10 A. & E. 151.

(*l*) *Thomas v. Jenkins* (1837) 6 A. & E. 525.

(*m*) *Barnes v. Mawson* (1813) 1 M. & S. 77.

motive for giving a true account of the matter (*n*). Thus in the case of a public right, as a highway, in which all the Queen's subjects are interested, it would seem that reputation from anyone is strictly speaking receivable, although of course it would be almost worthless unless it came from persons who were shown to have some means of knowledge as by living in the neighbourhood or frequently using the road in question (*o*). So where the question was as to the existence of a particular mining custom in the ancient assessionable manor of Tewington in the Duchy of Cornwall, and the plaintiff to prove the custom tendered as evidence of reputation written answers of the conventional tenants of the manor to interrogatories relating to the said custom addressed to them by commissioners, the defendant objected that they were inadmissible because the tenants as such had nothing to do with the mines; but it was held that since the minerals to which the custom was alleged to attach lay beneath their estates, and they were more likely than others living at a distance to become adventurers, and consequently subject to its operation, they were sufficiently connected with the subject to render their answers admissible declarations, especially as they appear to have been consulted as persons having a competent knowledge upon the matters inquired into (*p*). So where the issue was whether Newcastle was within the Hundred of Broxtowe, the plaintiff tendered as evidence in the nature of reputation five orders of sessions made some 170 years previously from which it more or less directly appeared that it was so included. It was objected by the defendants that it had not been proved that the justices who made the orders resided in the county or had any peculiar knowledge on the subject; but the court upheld

(*n*) *Newcastle v. Broxtowe* (1832) 4 B. & Ad. 273; *Crease v. Barrett* (1835) 1 C. M. & R. 919, 929—930; *R. v. Bedfordshire* (1855) 4 E. & B. 535, 542.

(*o*) *Crease v. Barrett* (1835) 1 C. M. & R. 919, 929.

(*p*) *Ibid.* Compare this case with *Talbot v. Lewis* (1834) 1 C. M. & R. 495.

the admission of the evidence on the ground that from the nature and character of their office alone they must be presumed to have sufficient acquaintance with the subject to which their declarations related (*q*).

Should the declaration express merely the declarant's own opinion it would obviously not comply with the definition of reputation. In order to do this it should not only be the declaration of one of the members of that body whose common opinion makes the reputation current in their day, but should also express the concurrent opinion of himself and all others who are similarly interested. But if the declarant's circumstances were such that he was apparently competent to testify as to what the common report upon the subject was, it will be presumed, till the contrary is shown, that his utterance was an expression of opinion common both to himself and others. For if the mere possibility that the deceased person's inference might proceed from some defective premises were sufficient to exclude it, this head of evidence would be entirely put an end to (*r*). Thus in an action for trespass to the plaintiff's close in the hamlet of Mortomley, which the defendants justified by the plea of a public way across it, the plaintiff called a witness who proved that forty years ago a public meeting was held in the hamlet to consider whether the road should be repaired or not, and that a document (which was produced in court from the custody of the surveyor of highways) was thereupon signed by himself and twelve other inhabitants since deceased. This document, which was admitted after objection, stated the opinion of those who signed it to be that the road was not and ought not to be a highway. On an application for a new trial on the ground that the document ought not to have been admitted because it did not contain anything which the parties to it had received as

(*q*) *Newcastle v. Broxtowe* (1832) 4 B. & Ad. 273 ; 1 N. & M. 601 ; compare *Richards v. Wood* (1831) 2 B. & Ad. 245.

(*r*) *R. v. Bedfordshire* (1855) 4 E. & B. 535, 544.

reputation from others, it was held that it had been rightly admitted. Lord Denman, C.J., said :—

I do not agree that it is necessary for persons giving an opinion as to the publicity of a way to state that they found themselves on reputation, although their statements ought in reality to be founded on some reputation. The statement of each of the deceased persons was reputation to some extent (*s*).

Not only must the declaration express the common report as opposed to an individual opinion, but this common report or reputation must assert not particular or individual facts tending to prove or disprove the right, but a general conclusion as to the existence of the right itself; it must be a general verdict not only of all the persons, but also as to the general effect of all the facts (*t*). Thus upon an indictment for alleged obstruction to a highway, where the question was whether the way was a public or private one, the prosecution called a witness to prove that one Ramplin, deceased, who in his lifetime occupied the meadow over which the way ran, had planted a willow there at a particular spot 30 years ago. The counsel for the prosecution then asked the witness what Ramplin had said, when he planted the willow, about his planting it. The question was objected to, but admitted; and the witness answered that Ramplin said he planted it to show where the boundary of the road was when he was a boy. The defendant having lost the verdict applied for a new trial, which the court granted on the ground of the misreception of this evidence. Coleridge, J., said :—

It is a rule that evidence of reputation must be confined to general matters and not touch particular facts. To try whether the declaration here was admissible according to that rule, let it be severed from the fact of planting which took place at the same time. Then it stands that Ramplin said he planted the tree for a certain purpose; namely,

(*s*) *Barraclough v. Johnson* (1838) 8 A. & E. 99.

(*t*) *Berkeley Peerage* (1811) 4 Camp. 401, 415.

to show the boundary. That is a particular fact; and evidence given of it is like proof of old persons having been heard to say that a stone was put down at a certain spot, or that boys were whipped, or cakes distributed, at a particular place, as the boundary; which statements would not be admissible (*u*).

It is necessary to the admissibility of declarations of this description that they should be made, like those admitted in pedigree cases, before the dispute has arisen in regard to which they are tendered in evidence (*x*). And by dispute is meant not the litigation but the controversy from which it originated (*y*). And the declarations in such cases will not be the less inadmissible because the declarant was unaware of the controversy (*z*). But the litigation, to have this effect, must be upon the precise point to which the declaration refers; it will not be sufficient that it was merely closely connected with it (*a*).

Declarations of this description, like the others we have mentioned, may be either oral (*b*), as statements made in course of a perambulation of boundaries (*c*), or written; and if in writing, in any form, as, for instance, written resolutions passed at a public meeting (*d*), statements contained in deeds (*e*), or in orders of sessions (*f*), or contained in the

(*u*) *R. v. Bliss* (1837) 7 A. & E. 550; cp. *Outram v. Morewood* (1793) 5 T. R. 121, 123; *Nicholls v. Parker* (1805) 14 East, 331; *Cooke v. Banks* (1826) 2 C. & P. 478; *Crase v. Barrett* (1835) 1 C. M. & R. 919, 930.

(*x*) *R. v. Cotton* (1813) 3 Camp. 444; *Berkeley Peerage* (1811) 4 Camp. 401, 416; *Richards v. Bassett* (1830) 10 B. & C. 657.

(*y*) *Berkeley Peerage* (1811) 4 Camp. 401, 417.

(*z*) *Ibid.*

(*a*) *Newcastle v. Broxtowe* (1832) 4 B. & Ad. 273, 280; cp. *Freeman v. Phillips* (1816) 4 M. & S. 486.

(*b*) *Thomas v. Jenkins* (1837) 6 A. & E. 525.

(*c*) *Weeks v. Sparke* (1813) 1 M. & S. 679, 689; *Woolway v. Rowe* (1834) 1 A. & E. 114; see above, p. 41, below, p. 174.

(*d*) *Barracough v. Johnson* (1838) 8 A. & E. 99.

(*e*) *Brett v. Beales* (1829) M. & M. 416; *Plaxton v. Dare* (1829) 10 B. & C. 17.

(*f*) *Newcastle v. Broxtowe* (1832) 4 B. & Ad. 272.

recitals of private acts of parliament (*g*), and even in maps, if it can be satisfactorily shown that they were made or adopted by such persons and under such circumstances as to bring them within the terms of the rule (*h*).

The best way to prove ancient rights is to prove particular acts and usage, as far back as living memory goes, and then adduce evidence of reputation in regard to the preceding time (*i*). It is not however essential to the admissibility of reputation that there should be any evidence of modern user; the absence of it only affects the weight, not the admissibility of such evidence (*k*).

§ 2.—Presentments of Customary Courts.

In certain cases the presentments of manorial and other like courts founded on ancient custom are evidence in the nature of reputation of the matters recorded in them. This however is subject to the condition that the court was duly constituted. Thus a survey of a seignory or lordship, which had been granted to Oliver Cromwell, taken by commissioners whom he had appointed, “being assisted therein by some tenants and officers of the said seignorie,” was held not to be admissible in support of a claim by a subsequent owner of the seignory to a customary payment, which it recorded, of fourpence per wey for every wey of coals transported out of the seignory (*l*). “If indeed it had appeared distinctly from the finding of a jury of the manor or of persons connected with the manor, so as to know its customs, that

(*g*) *Carnarvon v. Tillebois* (1844) 13 M. & W. 313. See below, p. 179, as to private and public Acts.

(*h*) *R. v. Milton* (1843) 1 C. & K. 58; cp. *Pollard v. Scott* (1791) Pea. 17; and *Hammond v. Bradstreet* (1854) 10 Ex. 390.

(*i*) *Anglesea v. Hatherton* (1842) 10 M. & W. 218, 239.

(*k*) *Crease v. Barrett* (1835) 1 C. M. & R. 919, 930; *Dunraven v. Llewellyn* (1850) 15 Q. B. 791, 804.

(*l*) *Beaufort v. Smith* (1849) 4 Ex. 450.

there was an ancient and customary payment of fourpence per wey for all coal carried over the bar to seaward, that would have been admissible as evidence of reputation, because authenticated by the opinion of a competent jury."

The admissibility of these presentments is also subject to the condition that they relate to a matter over which the customary court had jurisdiction. A presentment that certain land within the manor was not the freehold of A, a tenant of the manor, but was parcel of the waste, was held not admissible; the ownership of the freehold was held not to be within the jurisdiction of the homage, and it was besides a particular fact, and not a matter of general or public right (*m*). In 1834 some labourers from Carmarthenshire, being on Rossilly sands in the parish of Gower and turning up the sand with their hands, found a great number of Spanish dollars. The lord of the manor brought an action against them claiming the dollars as wreck, and tendered in evidence a presentment or survey in the form of answers to articles proposed to the tenants of certain commissioners, in which answers the tenants presented that the lord had a right to such wreck. The document was held inadmissible on the ground that wreck was a private right in which the tenants as such had no interest (*n*). On questions of boundary it appears that presentments are evidence (*o*), though it would seem that on principle they should not be admissible for this purpose except between persons interested in the manor, unless the presentment is accompanied by some open act of claim, as a perambulation (*p*). In two cases in which presentments or surveys were not admitted as evidence of boundary as against strangers to the manor, it appears that the persons holding the survey were not such a body as would have had

(*m*) *Richards v. Bassett* (1830) 10 B. & C. 657.

(*n*) *Talbot v. Lewis* (1834) 1 C. M. & R. 495; 6 C. & P. 603.

(*o*) 6 C. & P. at p. 604.

(*p*) See pp. 41, 172.

authority to hold them, and the court seems further to have thought that on the questions there in issue no authority less than statutory powers would have been adequate, in which case the survey would have been admissible as a public document (*q*). Such surveys however, even though made without jurisdiction in the sense above mentioned, may be evidence as admissions when they have been made by the authority of a predecessor in title of the party against whom they are tendered (*r*).

Subject to the conditions aforesaid, any presentment of a manorial court will be as admissible as reputation which purports to state the terms of any general customary right prevailing within the manor, as for example the customary mode of descent of lands therein (*s*), or the nature of a customary toll (*t*); and so will an ancient "customary" be evidence, though not forming part of the rolls, but kept and handed down together with them as a record of the customs of the manor (*u*). Most examples of presentments however consist of presentments of some particular act, as the seizure of a heriot by the lord on the death of a tenant, or the admission of a tenant who claims lands under a special custom of descent. These presentments of course imply the existence of the custom in pursuance of which they are made, but they do not expressly state it; on the other hand they involve a successful act of claim on the part of the lord or the tenant, as the case may be, and it is on this ground that they have usually, if not invariably, been admitted in evidence as *res gestæ* or acts of ownership (*x*).

(*q*) *Evans v. Taylor* (1838) 7 A. & E. 617; *Daniel v. Wilkin* (1852) 7 Ex. 429.

(*r*) *Bridgman v. Jennings* (1699) 1 Ld. Raym. 731.

(*s*) *Roe v. Parker* (1792) 5 T. R. 26.

(*t*) *Beaufort v. Smith* (1849) 4 Ex. 450, 470.

(*u*) *Denn v. Spray* (1786) 1 T. R. 466; *Portland v. Hill* (1866) 2 Eq. 765.

(*x*) See *Damerell v. Protheroe* (1847) 10 Q. B. 20; and pp. 41, 42, above.

§ 3.—Verdicts, Judgments, and Depositions.

It is well settled that whenever evidence of reputation in the ordinary sense is admissible, evidence may likewise be given of previous verdicts or judgments between persons who stand in *pari jure* or in *codem jure*, that is to say, persons who had the same relative interests as the present parties, and between whom the same public or general right was contested and decided (*y*). Thus in an action of trespass to land, where the defendant asserted and the plaintiff denied the existence of a highway over it, the plaintiff was held entitled to give in evidence the record of a previous action brought by himself against another defendant in which precisely the same issue had been raised in regard to the same particular place and the jury had decided in the plaintiff's favour (*z*). The right claimed by the defendants in both actions was the same public right. Both defendants therefore stood in the same relation to the plaintiff. And the same would have been the case had the plaintiff in the second action been successor in title of the plaintiff in the first. And the rule includes not only verdicts, judgments, and decrees (*a*), but also ancient depositions where the evidence has been recorded in that form (*b*).

This head of evidence is closely analogous to reputation, and has been sometimes spoken of as a kind of reputation (*c*). This view however is open to the objection that it must often happen that the jury, when drawn from the county at

(*y*) *Pim v. Curell* (1840) 6 M. & W. 234, 266; *Briscoe v. Lomax* (1838) 8 A. & E. 193, 214; *Freeman v. Phillips* (1816) 4 M. & S. 486.

(*z*) *Read v. Jackson* (1801) 1 East, 355.

(*a*) *Layborn v. Crisp* (1838) 4 M. & W. 320.

(*b*) *Freeman v. Phillips* (1816) 4 M. & S. 486; *Crease v. Barrett* (1835) 1 C. M. & R. 919, as explained in *Evans v. Taylor* (1838) 7 A. & E. 617, 626; *Pim v. Curell* (1840) 6 M. & W. 234.

(*c*) *Layborn v. Crisp* (1838) 4 M. & W. 320, 326; *Briscoe v. Lomax* (1838) 8 A. & E. 193, 213; *Pim v. Curell*, *supra*.

large, are not necessarily interested in the matter, and that whenever the verdict has been preceded by a contest as to the public or general right, its admission would offend against the rule that reputation to be admissible must be *ante litem motam* (*d*). The sounder view appears to be that such adjudications on particular cases are analogous to the presentments of particular acts in customary courts (*e*), and are to be regarded rather as *res gestæ* or acts of ownership than as reputation. And this is the view that has found most favour with the courts (*f*).

It follows from the above statement that awards are not admissible as reputation, for besides being made *post litem motam* they have ordinarily no claim in any sense to be public or general in their character (*g*).

(*d*) *Briscoe v. Lomax*, 8 A. & E. at p. 212; *Freeman v. Phillips* (1816) 4 M. & S. 486; *Evans v. Rees* (1839) 10 A. & E. 151, 156; *R. v. Brightside Bierlow* (1849) 13 Q. B. 933, 943.

(*e*) See p. 173.

(*f*) *R. v. Brightside Bierlow* (1849) 13 Q. B. 933, and *Neill v. Devonshire* (1882) 8 App. Ca. 135, 147.

(*g*) *R. v. Cotton* (1813) 3 Camp. 444; *Rogers v. Wood* (1831) 2 B. & Ad. 245; *Evans v. Rees* (1839) 10 A. & E. 151.

CHAPTER XII.

PUBLIC DOCUMENTS.

THE term public as applied to documents is used in two distinct senses. It may mean that a document to which it is applied is evidence either against all the world or against some class of persons of the facts duly stated in it; or it may mean that the original, being kept in some special custody for the benefit of the public or of some particular class of persons, is not produced in court, like a private document, but is proved by means of some kind of copy. There are many documents which are public in both these senses; there are many others which are only public in the latter sense. A will of personalty is for instance a public document for the purpose of adduction, the proper mode of proving it in court being the production of the probate merely; but it is not a public document in the other sense, any more than a deed of assignment of the property comprised in it would be. On the other hand a register of births is not only provable by means of a certified copy, but is also evidence for and against all persons of the births recorded in it. This chapter is concerned only with the effect of public documents which are admissible as media of proof of the facts stated or recited in them; the mode of their adduction is dealt with in the next Part.

Public documents which are available as media of proof consist for the most part either of the proceedings of some

department of the state or of some public authority acting under statutory powers for the benefit of the community, or of public records of specific classes of facts duly entered and kept by public officials in pursuance of a duty imposed on them in that behalf. At the head of the class stand public acts of parliament which are *prima facie* evidence against everyone of the facts recited in their preambles (*a*). A private statute on the other hand is only evidence of the facts stated in it as against those who were parties to it, although for the purpose of adduction it may be declared a public act, of which the courts must take notice (*b*). The gazette, which has long been issued under the authority of the government, is by the common law *prima facie* evidence of all acts of state which are published in it, though not of other matters (*c*); and it has further been made by statute a medium of proof for a large number of other matters of fact (*d*). The book of registry at Stationers' Hall is evidence against all the world of the copyright in the books there registered.

Such public documents are in principle but a kind of hearsay evidence, like the other exceptional forms of testimony already referred to, although this is perhaps somewhat lost sight of by reason of the official form of the entries contained in them, and from the fact that in the case of many of them it is not necessary to verify the official copies by which they may be proved but merely to produce them in court. The very gist of such documents however is that they contain a statement of some matter of fact by a person duly authorized to make it, who is not, save in very exceptional cases, called as a witness. And the guarantee of their credibility consists in the public duty of the official who keeps them to ascertain

(*a*) *R. v. Sutton* (1816) 4 M. & S. 532.

(*b*) *Brett v. Beales* (1829) M. & M. 416, 421; *Ballard v. Way* (1836) 1 M. & W. 520, 529. Cp. pp. 18, 304.

(*c*) *R. v. Holt* (1793) 5 T. R. 436; *R. v. Gardner* (1810) 2 Camp. 513.

(*d*) See pp. 294, 308.

the truth of the matters recorded for the benefit of the public, and to make accurate entries of them (*e*).

Besides the public documents which rest on such authority as is above mentioned there are some which have their origin in immemorial custom, such as the rolls of manorial courts. These however are public documents only within certain limits, that is to say, they are evidence of the facts which are duly recorded in them only for and against all persons interested in the manor (*f*), and their custody, being for the benefit of those persons alone, is not public in the same sense as that of the others. Corporation books at common law are public documents in the same limited sense (*g*). And the same limitation, though not expressed, would probably be held to be implied in the case of the minute-books of ordinary incorporated trading companies which are made by statute *primâ facie* evidence of the facts stated in them (*h*), and in other like cases.

It would however be inconsistent with the scope of this book to discuss these distinctions in detail. It appears sufficient to append a list of some of the principal public documents (using the term in both the senses explained above), together with a statement of their source, and of their effect in evidence. This has accordingly been done in Appendix A. The same appendix also sets forth their mode of adduction respectively, as mentioned in the next Part (*i*).

(*e*) *The Irish Society v. The Bishop of Derry* (1845) 12 Cl. & F. 641, 668; *Sturla v. Freccia* (1880) 5 App. Ca. at p. 642.

(*f*) *Sturla v. Freccia* (1880) 5 App. Ca. at p. 643.

(*g*) *Ibid.*

(*h*) See pp. 297, 298.

(*i*) Page 288.

CHAPTER XIII.

EVIDENCE TAKEN BEFORE TRIAL.

- § 1. *Depositions in Civil Cases.*
 (i) *Evidence in former Proceedings.*
 (ii) *Depositions before an Examiner.*
 (iii) *Perpetuation of Testimony.*
 § 2. *Depositions in Criminal Cases.*
 (i) *Indictable Offences Act, 1848.*
 (ii) *Coroners Act, 1887.*
 (iii) *Perpetuation of Testimony.*
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THE preceding chapters of this Part have been devoted to describing the various media of proof which may be adduced in court at the trial of a civil or criminal cause. But in some cases it is permissible to present to the court evidence which either happens to have been already taken in some previous proceedings between the parties or their predecessors, or which has been taken at some previous stage of the same proceedings for the express purpose of being put on record and preserved, in case the witnesses should be unable to attend at the trial. The several kinds of depositions thus admissible form the subject of this chapter.

§ 1.—Depositions in Civil Cases.

(i) *Evidence in former Proceedings.*—Where there have been former civil proceedings between the same parties who are now at issue and in relation to the same subject-matter, and the witnesses who then gave evidence are now unable to appear, it is admissible in certain prescribed cases to prove

in the present proceedings the terms of such previous evidence (*a*). It is immaterial that in the previous proceedings some other person was a party; but if the converse be the case, the evidence will not be allowed to be used against such of the present parties as were not parties to the former action (*b*). The rule also extends to cases where the former proceedings were between predecessors in title on one or both sides of the parties to the present suit. Thus where a suit was brought in 1815 by some of the customary tenants of a manor on behalf of themselves and all other customary tenants against the lord to establish their right to work minerals under the manor without his consent, and subsequently in 1871 a bill of the same nature was filed against the successor in title of the former lord by some of the customary tenants who did not derive title under any of the persons named as plaintiffs in the former action, it was held that the evidence given in the former suit by witnesses who had since died was admissible in the later one, the parties on each side in the later suit being held to be privies in estate to the parties in the earlier one (*c*). It seems that such former evidence is admissible if the witness is for any cause not producible, as for instance in case of his death, insanity, seclusion by the opposite party, illness, disappearance, or absence from the jurisdiction (*d*), although a narrower view has been expressed, according to which it would be admissible in the first three alone of the above-mentioned events (*e*).

In the Court of Chancery it was necessary to obtain an

(*a*) *Strutt v. Boringdon* (1803) 5 Esp. 56; *Wright v. Doe* (1834) 1 A. & E. 3; *Doe v. Derby*, *ibid.* 783; ep. *Doncaster v. Day* (1810) 3 Taunt. 262.

(*b*) *Wright v. Doe*, *supra*; *Brown v. White* (1876) 24 W. R. 456.

(*c*) *Llanover v. Homfray* (1881) 19 Ch. D. 224; ep. *Doncaster v. Day* (1810) 3 Taunt. 262.

(*d*) *Llanover v. Homfray* (1881) 19 Ch. D. 224, 230; *Strutt v. Boringdon* (1803) 5 Esp. 56; *Fry v. Wood* (1737) 1 Atk. 445; *Godbolt*, Ca. 418; (1623) p. 326; B. N. P. 239.

(*e*) *R. v. Scalfs* (1851) 17 Q. B. 230, 243; *R. v. Marshall* (1841) C. & M. 238. But these were criminal cases; see below, p. 187.

order to read evidence taken in former proceedings (*f*). But now by Rule 3 of Order XXXVII it is provided that—

An order to read evidence taken in another cause or matter shall not be necessary, but such evidence may, saving all just exceptions, be read on *ex parte* applications by leave of the court or a judge, to be obtained at the time of making any such application, and in any other case upon the party desiring to use such evidence giving two days' previous notice to the other parties of his intention to read such evidence.

This order would appear however to be confined to depositions or evidence taken on affidavit.

Such previous testimony, if taken orally in court in the ordinary way, must be proved by some person who heard it, and can speak to it either from recollection alone or by refreshing his memory from the notes he took of it. It has also been said that it may be proved by means of the judge's notes (*g*), but this would seem to require the consent of both the parties and the judge.

The rule applies *à fortiori* to evidence given on previous proceedings in the same case, as for instance where there is a second trial, either in consequence of a disagreement of the jury, or after the verdict has been set aside and a new trial ordered.

In regard to civil actions Rule 25 of Order XXXVII provides that—

All evidence taken on the hearing or trial of any cause or matter may be used in any subsequent proceedings in the same cause or matter.

This rule re-enacts the effect of Rule 15 of the Order of Court of February 1861. It is wide enough to include evidence taken by oral examination at the hearing, and in the Court of Chancery the evidence could be so taken by special order, although the ordinary mode of taking it

(*f*) Cons. Ord. (Order XIX r. 4); see Morgan's Ch. Acts and Orders, 3rd ed., 1862.

(*g*) *Doncaster v. Day* (1810) 3 Taunt. 262.

was by affidavit or by *ex parte* examination before an examiner (*h*).

(ii) *Depositions before an Examiner*.—In civil causes or matters, whenever it seems probable that any intended witness will from any cause be unable to attend and give evidence at the trial, the court has power to make an order at the instance of the party who desires that the evidence may be recorded, that the witness's examination shall be taken beforehand. Rules 5 to 24 of Order XXXVII deal with such examinations.

RULE 5. The court or a judge may in any cause or matter where it shall appear necessary for the purposes of justice, make any order for the examination upon oath before the court or judge or any officer of the court or any other person and at any place of any witness or person, and may empower any party to any such cause or matter to give such depositions in evidence therein on such terms, if any, as the court or a judge may direct.

The evidence of the witness is taken down in writing by the officer appointed to take the examination, and is afterwards filed in the High Court. Other rules of the same order prescribe the procedure to be followed and provide that the interrogation of the witness shall be conducted in accordance with the practice observed at the trial of a cause. It will be noted that the terms of this rule enable the court to make an order entitling a party not only to examine here a witness who is about to go abroad, but also to examine abroad any witness who either resides or is temporarily staying out of this country. With regard to the conditions on which such depositions may be given in evidence, Rule 18 provides that—

Except where by this order otherwise provided or directed by the court or a judge, no deposition shall be given in evidence at the hearing or trial of the cause or matter without the consent of the party against whom the same may be offered, unless the court or

(*h*) See Order of Court, Feb. 1861, r. 4.

judge is satisfied that the deponent is dead or beyond the jurisdiction of the court, or unable from sickness or other infirmity to attend the hearing or trial, in any of which cases the depositions certified under the hand of the person taking the examination shall be admissible in evidence, saving all just exceptions, without proof of the signature of such certificate.

The rule does not expressly exclude the evidence in the event of the witness having disappeared or being kept away by the party against whom the deposition is tendered; and the terms of these two rules appear quite wide enough to enable the court to make an order in such case for the deposition to be read.

(iii) *Perpetuation of Testimony*.—In certain cases where a person entitled in some future event to some property or office, desires to provide for the possibility of future contest by putting on record and preserving the evidence of his rights, he is entitled to commence proceedings for this express purpose.

Rules 35 to 38 of Order XXXVII contain provisions for such perpetuation of testimony.

RULE 35. Any person who would, under the circumstances alleged by him to exist, become entitled upon the happening of any future event to any honour, title, dignity, or office, or to any estate or interest in any property, real or personal, the right or claim to which cannot by him be brought to trial before the happening of such event, may commence an action to perpetuate any testimony which may be material for establishing such right or claim.

Such action is brought against the person whose interest it would be to interfere with such alleged claim or right of the plaintiff, although it cannot be set down for trial (*i*). If however at any future time, when the plaintiff's interest or right has come into possession, he should be compelled to litigate with such person or his successors in title, the

(i) Rule 38.

evidence so taken in the action for perpetuation of testimony, will, subject to the order of the judge, be admissible (*k*).

§ 2.—Depositions in Criminal Causes.

The practice of taking before a justice the depositions of the witnesses against a person charged with crime, before committing him for trial, was instituted by the statutes 1 & 2 Ph. & M. c. 13 and 2 & 3 Ph. & M. c. 10. Those Acts were repealed by the statute 7 Geo. 4 c. 64, which substituted somewhat further provisions as to the taking of depositions by justices and by coroners. The provisions relating to justices were repealed by the Indictable Offences Act, 1848, 11 & 12 Vict. c. 42, which now regulates the taking of such depositions, and the conditions of their admissibility in evidence, and by a later statute, 30 & 31 Vict. c. 35, additional provision has been made for justices to take and record in certain events testimony of witnesses with regard to indictable offences. The provisions of the Act of Geo. IV. as to coroners were repealed by the Coroners Act, 1887, 50 & 51 Vict. c. 71, which now regulates the taking of the depositions of witnesses at coroners' inquisitions. Similar provisions are also contained in the two statutes relating to offences against children hereinafter mentioned.

(i) *Indictable Offences Act*, 1848.—Sect. 17 of 11 & 12 Vict. c. 42 provides that—

In all cases where any person shall appear or be brought before any justice or justices of the peace charged with any indictable offence, whether committed in England or Wales, or upon high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in presence of such

(*k*) Semble, the evidence would be admitted in the same events as those mentioned in the last section of this chapter. For examples of such actions, see *In re Stoer* (1884) 9 P. D. 120; and *Bute v. James* (1886) 33 Ch. D. 157.

accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing, and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do, and if upon the trial of the person so accused as first aforesaid it shall be proved, by the oath or affirmation of any credible witness, that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.

It has been held that the statute has not repealed the admissibility of depositions in the event of the witness being prevented by the defendant from attending at the trial (though they were never admissible where he simply could not be found) (*l*); and it would seem that by the same reasoning they would be admissible in the event of the witness's insanity (*m*). The provision as to illness applies to the case of pregnancy, although a natural condition, if it produces a condition of illness incapacitating from travel (*n*); but such old age and nervousness as would make it hazardous to travel to court and give evidence will not render the deposition admissible, if there is no illness (*o*).

The unsworn evidence of a child of tender years under the Criminal Law Amendment Act, 1885, 48 & 49 Vict. c. 69,

(*l*) *R. v. Scaife* (1851) 17 Q. B. 238; *R. v. Austin* (1856) Dears. 612.

(*m*) *R. v. Scaife*, *supra*, p. 243; *R. v. Marshall* (1840) C. & M. 147.

(*n*) *R. v. Wellings* (1878) 3 Q. B. D. 426.

(*o*) *R. v. Farrell* (1874) L. R. 2 C. C. R. 116.

is not admissible as a deposition (*p*). But similar evidence on prosecutions under the Prevention of Cruelty to, and Protection of, Children Act, 1889, 52 & 53 Vict. c. 44, is by sect. 8 of that statute to be deemed to be a deposition and admissible as such. And now by sect. 12 of the Prevention of Cruelty to Children (Amendment) Act, 1894, 57 & 58 Vict. c. 27, that provision has been extended to proceedings in respect of many other offences against children, and by sects. 14 and 15 the provisions for taking the depositions of any child who has been the subject of an offence under sect. 1 of the principal Act are amplified.

(ii) *Coroners Act*, 1887.—Sect. 4 of 50 & 51 Vict. c. 71 provides that:—

(1.) The coroner and jury shall at the first sitting of the inquest, view the body, and the coroner shall examine on oath touching the death all persons who tender their evidence respecting the facts and all persons having knowledge of the facts whom he thinks it expedient to examine.

(2.) It shall be the duty of the coroner in a case of murder or manslaughter to put into writing the statement on oath of those who know the facts and circumstances of the case, or so much of such statement as is material, and any such deposition shall be signed by the witness and also by the coroner.

Sect. 5 (3) provides that—

The coroner shall deliver the inquisition, deposition, and recognizances, with a certificate under his hand that the same have been taken before him, to the proper officer of the court in which the trial is to be, before or at the opening of the court.

This statute, like those which preceded it, contains no provision as to the events in which the depositions taken by the coroner are admissible on the trial of the offender. But it has been held that these events are the death or insanity of the witness, illness disabling him from travelling, or the fact that he is kept away by the defendant (*q*).

(*p*) *R. v. Prunty* (1887) 16 Cox, 344.

(*q*) 1 Hale, P. C. 305; *R. v. Wilshaw* (1841) C. & M. 145; *R. v. Scalfie* (1851) 17 Q. B. 238; *R. v. Austin* (1856) Dears. 612.

(iii) *Perpetuation of Testimony*.—Sect. 6 of 30 & 31 Vict. c. 35, after reciting the effect of the provisions of sect. 17 of the Indictable Offences Act, 1848, proceeds thus :—

And whereas by the 17th section of the Act 11 & 12 Vict. c. 42, it is permitted under certain circumstances to read in evidence on the trial of an accused person the deposition taken in accordance with the provisions of the said Act of a witness who is dead, or so ill as to be unable to travel: And whereas it may happen that a person dangerously ill, and unable to travel, may be able to give material and important information relating to an indictable offence, or to a person accused thereof, and it may not be practicable or permissible to take, in accordance with the provisions of the said Act, the examination on deposition of the person so being ill, so as to make the same available as evidence in the event of his or her death before the trial of the accused person, and it is desirable in the interests of truth and justice that means should be provided for perpetuating such testimony, and for rendering the same available in the event of the death of the person giving the same: therefore, whenever it shall be made to appear to the satisfaction of any justice of the peace that any person dangerously ill, and in the opinion of some registered medical practitioner not likely to recover from such illness, is able and willing to give material information relating to any indictable offence, or relating to any person accused of any such offence, and it shall not be practicable for any justice or justices of the peace to take an examination or deposition in accordance with the provisions of the said Act of the person so being ill, it shall be lawful for the said justice to take in writing the statement on oath or affirmation of such person so being ill, and such justice shall thereupon subscribe the same, and shall add thereto by way of caption a statement of his reason for taking the same, and of the day and place when and where the same was taken, and of the names of the persons (if any) present at the taking thereof, and, if the same shall relate to any indictable offence for which any accused person is already committed or bailed to appear for trial, shall transmit the same with the said addition to the proper officer of the court for trial at which such accused person shall have been so committed or bailed, and in all other cases he shall transmit the same to the clerk of the peace of the county, division, city, or borough, in which he shall have taken the same, who is hereby required to preserve the same, and file it of record; and if afterwards, upon the trial of any offender or offence to which the same may relate, the person who made the same statement shall be proved to be dead, or if it shall be proved that there is no reasonable probability that such person will ever be able to travel or to give evidence, it shall be lawful to read

such statement in evidence, either for or against the accused, without further proof thereof, if the same purports to be signed by the justice by or before whom it purports to be taken, and provided it be proved to the satisfaction of the court that reasonable notice of the intention to take such statement has been served upon the person (whether prosecutor or accused) against whom it is proposed to be read in evidence, and that such person, or his counsel or attorney, had or might have had, if he had chosen to be present, full opportunity of cross-examining the deceased person who made the same.

Sect. 7. Whenever a prisoner in actual custody shall have served or shall have received notice of an intention to take such statement as hereinbefore mentioned, the judge or justice of the peace by whom the prisoner was committed, or the visiting justices of the prison in which he is confined, may, by an order in writing, direct the gaoler having the custody of the prisoner to convey him to the place mentioned in the said notice for the purpose of being present at the taking of the statement; and such gaoler shall convey the prisoner accordingly, and the expenses of such conveyance shall be paid out of the funds applicable to the other expenses of the prison from which the prisoner shall have been conveyed.

It has been held that the notice prescribed by the section must be express and in writing; otherwise, even though the prisoner may have been present at the examination, it will be inadmissible (*r*). The statement provided for by this section differs therefore from the depositions taken under 11 & 12 Vict. c. 42 in the following respects: (a) no proceedings need have been commenced at the time that it was taken; (b) it is not essential that the parties should be present, provided the prescribed notice has been given; (c) the conditions on which the statement is admissible are somewhat different.

Sects. 14 and 15 of the Prevention of Cruelty to Children (Amendment) Act, 1894, 57 & 58 Vict. c. 27, contain somewhat similar provisions with regard to taking the deposition of a child in respect of whom an offence under sect. 1 of the principal Act is alleged to have been committed, and its admissibility in evidence at the trial.

CHAPTER XIV.

EVIDENCE BY AFFIDAVIT AND UNDER DISCRETIONARY ORDERS.

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- § 1. *Evidence by Affidavit.*
 - § 2. *Account Books as Evidence.*
 - § 3. *Evidence of Particular Facts.*
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§ 1.—Evidence by Affidavit.

EVIDENCE by affidavit is chiefly used upon summary applications, but it may also in certain events be used at the trial of a civil cause.

The two following rules prescribe generally the conditions of its admissibility at the trial:—

O. XXXVII r. 1.—In the absence of any agreement in writing between the solicitors of all parties, and subject to these rules, the witnesses at the trial of any action or at any assessment of damages shall be examined *virâ voce* and in open court, but the court or a judge may at any time for sufficient reason order that any particular fact or facts may be proved by affidavit, or that the affidavit of any witness may be read at the hearing or trial, on such conditions as the court or judge may think reasonable, or that any witness whose attendance in court ought for some sufficient cause to be dispensed with be examined by interrogatories or otherwise before a commissioner or examiner, provided that where it appears to the court or a judge that the other party *bonâ fide* desires the production of a witness for cross-examination, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit.

O. XXXVIII r. 28.—When the evidence is taken by affidavit any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party may serve upon the party by whom such affidavit has been filed a notice in writing requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of fourteen days

next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court or judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the court or a judge.

The following rule relates to the admissibility of evidence by affidavit on interlocutory applications:—

O. XXXVIII r. 1.—Upon any motion, petition, or summons, evidence may be given by affidavit; but the court or a judge may, on the application of either party, order the attendance for cross-examination of the person making such affidavit.

With regard to the admissibility of hearsay evidence in affidavits, Rule 3 of the same order provides as follows:—

Affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted.

Hence affidavits differ from other forms of testimony, whether given orally or recorded in depositions, in this, that if they are for use on interlocutory motions, hearsay is admissible generally without any of the restrictions discussed in the preceding chapters of this Part, whereas on all other occasions, save where any order to the contrary is made under any Rule hereinafter mentioned, they must be confined to such facts as a witness can prove of his own knowledge, as explained in Chapter I of this Part.

The procedure relating to the making, filing, and use in evidence of affidavits is contained in Order XXXVIII.

§ 2.—Account Books as Evidence.

Where it is necessary to the decision of the issues that an account should be taken which cannot conveniently be taken before the judge or jury, it is the practice of the court to delegate the trial of this part of the issues by either directing that the account shall be taken by one of its ordinary officers

or referring the matter to an official or special referee (*a*). Order XXXIII contains the following provisions with regard to the giving of directions for the taking of an account and the mode of taking it in pursuance thereof:—

RULE 2. The court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner.

RULE 3. The court or a judge may, either by the judgment or order directing an account to be taken or by any subsequent order, give special directions with regard to the mode in which the account is to be taken or vouched, and in particular may direct that in taking the account, the books of account in which the accounts in question have been kept shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised (*b*).

There is nothing in these rules to restrict the jurisdiction to make orders thereunder to cases where the persons who would ordinarily be called to prove the accounts are dead, nor is it in practice confined to such cases alone (*c*). But the power vested in the court to order that books of account shall be taken as *prima facie* evidence of the truth of the matters stated in them is not generally resorted to for the sake of merely saving expense, when the ordinary means exist for proving the account. But if vouchers have been lost or for any other reason it is impossible to take the accounts in the ordinary manner, the court may make an order under these rules (*d*).

(*a*) See O. XV and O. XXXII rr. 2—9; Arbitration Act, 1889, 52 & 53 Vict. c. 49, ss. 14 and 15.

(*b*) The provisions of this rule reproduce in substance sect. 54 of the Chancery Procedure Amendment Act, 1852, 15 & 16 Vict. c. 86, which section was repealed in 1883 by 46 & 47 Vict. c. 49.

(*c*) See Seton on Decrees, 4th ed., vol. 2, p. 774, Form No. 7.

(*d*) *Lodge v. Prichard* (1853) 3 De G. M. & G. 906; *Ewart v. Williams* (1855) 7 De G. M. & G. 68. The practice under these rules will be found in Daniell's Chancery Practice, and Seton on Decrees.

These provisions as to account-books call to mind an act of parliament which is not resorted to in practice, though unrepealed, and which shows that in the beginning of the 17th century a tradesman's shop-books were admitted, in actions for goods sold or work done, as *prima facie* evidence of the transactions recorded in them. This is the statute 7 Jac. 1 c. 12, which, after reciting that tradesmen made fraudulent entries in their shop-books or left the entries uncanceled after they had been paid, in order to charge their customers unjustly after the particulars had been forgotten, enacted that such shop-books should not be given in evidence by tradesmen in any such action unless it were brought within one year after the accrual of the claim, with a proviso however that the limitation should not apply in actions between the tradesman or merchant and his fellows.

§ 3.—Evidence of Particular Facts.

Rule 7 of Order XXX, relating to the Summons for Directions, is in the following terms:—

On the hearing of the summons, the court or a judge may order that evidence of any particular fact, to be specified in the order, shall be given by statement on oath of information and belief, or by production of documents or entries in books, or by copies of documents or entries or otherwise as the court or judge may direct.

CHAPTER XV.

PRIVILEGE.

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| § 1. <i>Penal Consequences.</i>
§ 2. <i>Legal Professional Privilege.</i>
§ 3. <i>Husband and Wife.</i>
§ 4. <i>State Documents.</i>
§ 5. <i>Title Deeds.</i> | § 6. <i>Privileged Admissions in Civil Cases.</i>
§ 7. <i>Privileged Admissions in Criminal Cases.</i> |
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THE admissibility of the media of proof described in the foregoing chapters of this Part, must be taken subject to certain qualifications. There are some matters as to which the law on public grounds prohibits the giving of any evidence, and with regard to others it confers either on the party or on the witness a right, which he may claim or may waive as he likes, of not disclosing them. This disability or privilege may be insisted on at any stage of the proceedings whenever the occasion to do so first arises, whether it be upon examination in the witness-box or upon application made in a civil cause for discovery of documents or to administer interrogatories. The first four of the heads of privilege enumerated in this chapter apply indifferently to parties or witnesses, the fifth to witnesses alone, and the sixth and seventh to parties alone.

§ 1.—Penal Consequences.

A person whether party or witness cannot be compelled to give any evidence which would tend to subject him to any

punishment, penalty, forfeiture or ecclesiastical censure (*a*). No objection can be taken on this ground to any question or application being addressed to him since he is at liberty to waive his privilege and must, moreover, if he objects to giving the evidence, make his objection on oath (*b*). And the mere fact that a witness states his belief that his answer will have this effect is not enough to excuse him from answering; the judge must be satisfied from the circumstances of the case and the nature of the evidence which the witness is called on to give that there is reasonable ground to apprehend danger to him from his being compelled to answer; but if it is once made to appear that the witness is in danger, great latitude should be allowed to him in judging for himself of the effect of any particular question (*c*). Where lapse of time has become a bar to any criminal or other proceedings being taken (*d*), or where the offence has been purged or has been pardoned (*e*), the privilege no longer exists. In some cases special provision has been made by statute with regard to particular offences that no privilege shall be available in civil proceedings relating thereto, but that the evidence so disclosed shall not be used in any criminal prosecution (*f*).

It was formerly questioned whether a witness was privileged also from answering any question the answer to which would tend to subject him to other civil liabilities, as debt. This was set at rest by the statute 46 Geo. 3 c. 37, which enacted that a witness cannot refuse to answer a question

(*a*) *U. S. of America v. McRae* (1867) 3 Ch. 79, 83, 87; *Redfern v. Redfern* [1891] P. D. 139, 147.

(*b*) *Fisher v. Owen* (1878) 8 Ch. D. 645, 651; *Webb v. East* (1880) 5 Ex. D. 108.

(*c*) *R. v. Boyes* (1861) 30 L. J. Q. B. 301; *In re Reynolds* (1882) 20 Ch. D. 294.

(*d*) *Roberts v. Allatt* (1828) M. & M. 192; *Att.-Gen. v. Cunard S.S. Co.* (1887) 4 T. L. R. 177.

(*e*) *R. v. Boyes* (1861) 30 L. J. Q. B. 301.

(*f*) Cp. 24 & 25 Vict. c. 96, s. 85, with regard to frauds by agents, bankers, or factors.

relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture, by reason only that the answering of such question may establish or tend to establish that he owes a debt, or is otherwise subject to a civil suit, either at the instance of the Crown, or of any other person or persons.

The reported decisions illustrate the application of this head of privilege to cases of bigamy (*g*), bribery (*h*), publication of libel (*i*), penalties (*h*), adultery (*l*), confiscation of a party's property by the law of a foreign state (*m*), and forfeiture of a term of years for breaches of covenant (*n*).

§ 2.—Legal Professional Privilege.

A witness, whether a party or not, is entitled to what is known as legal professional privilege. This privilege protects from disclosure two classes of communications—(i) all communications made by a client to his legal adviser, whether solicitor or counsel, in his professional capacity for the purpose of procuring his legal advice to protect his interests; (ii) evidence, reports, advice, &c.—in short, all statements of facts or opinion procured by the legal adviser on behalf of his client for the purpose of litigation, whether commenced or contemplated, in which the client is or will be concerned (*o*).

(*g*) *Harvey v. Loeckin* (1884) 10 P. D. 122.

(*h*) *R. v. Boyes* (1861) 30 L. J. Q. B. 301.

(*i*) *Lamb v. Munster* (1882) 10 Q. B. D. 110; *Pankhurst v. Wighton & Co.* (1886) 2 T. L. R. 745.

(*k*) *Hunnings v. Williamson* (1883) 10 Q. B. D. 459; *Martin v. Treacher* (1886) 16 Q. B. D. 507.

(*l*) *Redfern v. Redfern* [1891] P. D. 139.

(*m*) *U. S. of America v. MeRae* (1867) 3 Ch. 79.

(*n*) *Pye v. Butterfield* (1864) 34 L. J. Q. B. 17.

(*o*) *Greenhough v. Gaskell* (1833) 1 My. & K. 98; as to this case see 4 B. & Ad. 876; 2 M. & W. 100; *Minet v. Morgan* (1874) 8 Ch. 361; *Wheeler v. Le Marchant* (1881) 17 Ch. D. 675; *Southwark, &c. Co. v. Quick* (1878) 3 Q. B. D. 315.

The ground of this rule is not any special importance of the legal profession, but the expedience of securing to every man the full protection of the laws. The understanding and administration of these requires special knowledge and skill; but a man would be practically precluded from obtaining the aid of skilled advisers, if his communications with them were not thus protected from publicity (*p*).

Neither client nor solicitor need act personally in the above relations in order that the privilege may be claimable; it exists equally when they act by means of clerks, interpreters, or other agents (*q*), and it matters not whether the communications or statements are oral or written, provided that they were made for the prescribed purpose (*r*).

No privilege can be thus acquired for any communication which is made for the purpose of committing an illegal act, since that can be no part of the legitimate protection of the client's interests, which is the ground of the rule (*s*). Nor does it extend to any other relation than that of client and legal adviser: there is no privilege for communications made to a medical man or a priest or any non-legal business agent (*t*). Nor does it extend to every sort of communication between client and legal adviser; the communications to be protected must be made confidentially in reliance on his professional capacity (*u*). But it applies to communications connected with anything within the ordinary scope of a

(*p*) *Greenhough v. Gaskell* (1833) 1 My. & K. 98.

(*q*) *Anderson v. Bank of British Columbia* (1876) 2 Ch. D. 644; *Wheeler v. Le Marchant* (1881) 17 Ch. D. 675.

(*r*) *Pearee v. Foster* (1885) 15 Q. B. D. 114; *Greenhough v. Gaskell* (1833) 1 My. & K. 98.

(*s*) *Russell v. Jackson* (1851) 9 Hare, 392; *Follett v. Jefferyes* (1850) 1 Sim. N. S. 3, 17; *R. v. Cox* (1884) 14 Q. B. D. 153.

(*t*) *Wheeler v. Le Marchant* (1881) 17 Ch. D. 675; *Slade v. Tucker* (1880) 14 Ch. D. 824.

(*u*) *McCormac v. Bell* (1876) 1 C. P. D. 471; *Anderson v. Bank of British Columbia* (1876) 2 Ch. D. 644; *Gardner v. Irvin* (1878) 4 Ex. D. 49; *Wheeler v. Le Marchant* (1881) 17 Ch. D. 675; *O'Shea v. Wood* [1891] P. D. 286.

solicitor's business, and extends therefore to communications connected with the sale of estates or the raising of money (*x*).

On the other hand a fact known, a statement made, or a document existing prior to or independent of the relationship out of which alone the privilege springs will not become privileged merely by reason of its being submitted to the legal adviser for any purpose which would create privilege had they been first known or first made solely for the purpose or in consequence of such relation (*y*). The statement whether oral or written must come into existence as a communication made for the express purpose of obtaining professional advice (*z*). So, the outside of a deed whereby its date and general character may be identified (though its contents are privileged) (*a*), the name of the legal adviser's client (*b*) or his residence (*c*), or other matters of fact not connected with legal advice (*d*), are not privileged, although communicated in the course of professional communications, unless themselves communicated confidentially for the purpose of legal advice. It is doubtful indeed whether mere facts patent to the senses are as such privileged by reason of their having been learnt in the course of privileged communications, if dissociated wholly from all inferences of fact which are the result of such communications (*e*).

These limitations were well summed up thus in an old case (*f*):

There are certain apparent exceptions, namely, where the com-

(*x*) *Carpenael v. Powis* (1845) 1 Phillips, 687, 692; *Turquand v. Knight* (1836) 2 M. & W. 98, at p. 100.

(*y*) *Dwyer v. Collins* (1852) 7 Ex. 639; *Lyell v. Kennedy* (1883) 9 App. Ca. 81; *Pearee v. Foster* (1885) 15 Q. B. D. 114.

(*z*) *Cleave v. Jones* (1852) 7 Ex. 421.

(*a*) *Bursill v. Tanner* (1885) 16 Q. B. D. 1.

(*b*) *Ibid.*

(*c*) *Ex parte Campbell, Re Catheart* (1870) 5 Ch. 703.

(*d*) *Bramwell v. Lucas* (1824) 2 B. & C. 745.

(*e*) *Kennedy v. Lyell* (1883) 23 Ch. D. 387.

(*f*) *Greenhough v. Gaskell* (1833) 1 My. & K. 98.

munication was made before the legal adviser was employed as such or after his employment had ceased; where though consulted by a friend because he was an attorney yet he refused to act as such, and was therefore only applied to as a friend; or where there could not be said in any correctness of speech to be a communication at all, as where, for instance, a fact, something that was done, became known to him, from his having been brought to a certain place by the circumstances of his being an attorney, but of which fact any man, if there, would have been equally conusant, or where the communication was not in its nature private, and could in no sense be termed the subject of a confidential disclosure; or where the thing disclosed had no reference to the professional employment, though disclosed while the relation of attorney and client subsisted; or where the attorney made himself a subscribing witness and thereby assumed another character for the occasion, and adopting the duties which it imposes became bound to give evidence of all that a subscribing witness can be required to prove.

Where the parties to the suit occupy towards each other the relation of agent and principal, trustee and *cestui que trust*, corporation and member of the corporation, and the like, and it appears that communications or documents in the possession of such agent, trustee or corporation which would be privileged as against strangers have been obtained in their aforesaid capacity, the other party will be thereby entitled to have them disclosed and to resist any claim of privilege in respect of the same (*g*). So the communications of a testator to his legal adviser are not protected as between two persons both claiming under him (*h*).

In every case the privilege is the right not of the legal adviser but of the client, and he alone therefore can waive it (*i*). But a waiver of a separate part of a privileged communication does not debar him from insisting on it as to the residue (*k*). And subject to such waiver, when once

(*g*) *Re Postlethwaite* (1887) 35 Ch. D. 722; *Mayor and Corporation of Bristol v. Cox* (1884) 26 Ch. D. 678.

(*h*) *Russell v. Jackson* (1851) 9 Hare, 392.

(*i*) *Pearee v. Foster* (1885) 15 Q. B. D. 114.

(*k*) *Lyell v. Kennedy* (1884) 27 Ch. D. 1.

communications or statements are privileged they always remain so (*l*).

As to the first of the two classes of communications protected by this head of privilege it was formerly considered that statements procured by a client or his legal adviser for the purpose merely of the latter giving to the former legal advice, were not privileged, and that it was only when made in contemplation of litigation that they could be so (*m*). Now however it is settled that all such statements are privileged (*n*).

As to the second class of protected communications it is held that if the legal adviser instructs his own client to obtain information for the purpose of the litigation it will be not less privileged than if he had employed a clerk or some other agent (*o*). The following are examples which illustrate this point:—not privileged: correspondence of defendant, sued for breach of warranty of quality of goods, with vendor from whom he purchased, with a view to ascertain truth of complaint (*p*); report by a railway servant in the ordinary course of his duty to his superior officer of an accident in respect of which the plaintiff was suing the company (*q*); privileged: medical opinions and reports procured in a similar case with a view to litigation (*r*); letters written by a solicitor in anticipation of litigation to possible witnesses (*s*); surveys of a vessel sworn to have been made solely for the purpose of a

(*l*) *Pearce v. Foster* (1885) 15 Q. B. D. 114; *Bullock v. Corry* (1878) 3 Q. B. D. 356; *Haslam Foundry, &c. v. Hall* (1887) 3 T. L. R. 776.

(*m*) *Woolley v. North London Rail. Co.* (1869) L. R. 4 C. P. 602; *Wheeler v. Le Marchant* (1881) 17 Ch. D. 675; *Greenhough v. Gaskell* (1833) 1 My. & K. 98.

(*n*) *Southwark, &c. Water Co. v. Quick* (1878) 3 Q. B. D. 315; *Pearce v. Foster* (1885) 15 Q. B. D. 114.

(*o*) *Wheeler v. Le Marchant* (1881) 17 Ch. D. 675.

(*p*) *English v. Tottie* (1875) 1 Q. B. D. 141.

(*q*) *Woolley v. North London Rail. Co.* (1869) L. R. 4 C. P. 602.

(*r*) *Pacey v. London Tramways Co.* (1876) 2 Ex. D. 440, note (1).

(*s*) *McCorquodale v. Bell* (1876) 1 C. P. D. 471.

contemplated litigation (*t*); and copies of Board of Trade depositions taken for that purpose (*u*). Even anonymous letters written to a solicitor for the purpose of assisting him in a pending litigation have been held privileged (*x*). It seems doubtful whether documents privileged in one suit are privileged in a succeeding suit, unless either the issues are substantially the same or they are covered by the first head of privilege (*y*).

The second class of protected communications appears to be more extensive than the first in this respect, that it appears to embrace documents which have been collected for the purpose of the litigation, even though not brought into existence with a view to it (*z*).

§ 3.—Husband and Wife (*a*).

(i) *Access*.—It is a rule of the common law, based on public policy, that neither husband nor wife is compellable or competent to give evidence of their having or not having had sexual connection with each other after the marriage at any given time or at all: that is, although they may give evidence of the date of their marriage and of the date of the birth of offspring of the wife, whether born before or after marriage, they may not give any evidence tending to show that a child born of the wife during the marriage is not the legitimate child of them both (*b*). This rule therefore pre-

(*t*) *The Theodor Körner* (1878) 3 P. D. 162.

(*u*) *The Palermo* (1883) 9 P. D. 6.

(*x*) *Re Thomas Holloway, Young v. Holloway* (1887) 12 P. D. 167.

(*y*) *Haslam Foundry, &c. v. Hall* (1887) 3 T. L. R. 776; *Rawstone v. Preston Corporation* (1885) 30 Ch. D. 116.

(*z*) *Lyell v. Kennedy* (1884) 27 Ch. D. 1; but *quære*, and see *Cleave v. Jones* (1852) 7 Ex. 42; *Pearce v. Foster* (1885) 15 Q. B. D. 114.

(*a*) It will be observed that some of the rules dealt with under this head are rules of partial incompetency rather than of privilege; but they resemble privilege in this, that they only apply to particular heads of evidence of a witness otherwise competent.

(*b*) *Goodright v. Moss* (1777) 2 Cowp. 591.

cludes them not only from giving direct evidence of access or non-access, but also from giving any evidence of circumstances from which the same is intended to be inferred (*e*). Nor does the fact that one of them has died release the other from his or her incompetency to give evidence of this description (*d*). It has been held however that evidence of declarations and conduct of the wife (*e*) and her alleged paramour (*f*) are admissible on an issue as to the legitimacy of a child of the wife. The rule must also be read subject to the competency of a witness, whether a party or not, to give evidence tending to prove his or her adultery, which may of course tend indirectly to show non-access. It has however been held that evidence of this description, tending to show non-access, is not admissible except in proceedings instituted in consequence of adultery, and is therefore not admissible in affiliation proceedings or in an action for the execution of a trust (*g*).

(ii) *Adultery*.—By 32 & 33 Vict. c. 68 s. 3, which renders the parties to any proceeding instituted in consequence of adultery and the husbands and wives of such parties competent to give evidence in such proceeding, it is provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery (*h*). This provision appears to have been held to render the parties or their husbands and wives competent to give such evidence only in proceedings instituted in conse-

(*e*) *R. v. Sourton* (1836) 5 A. & E. 180.

(*d*) *R. v. Kea* (1809) 11 East, 132.

(*e*) *Aylesford Peerage* (1885) 11 App. Ca. 1.

(*f*) *Burnaby v. Baillie* (1889) 42 Ch. D. 282.

(*g*) *Guardians of Poor of Nottingham v. Tomkinson* (1879) 4 C. P. D. 343 ;
ep. Burnaby v. Baillie (1889) 42 Ch. D. 282, 292.

(*h*) *Hebblethwaite v. Hebblethwaite* (1869) L. R. 2 P. & M. 29.

quence of adultery (*i*). Evidence however of the declarations and conduct of the wife (*k*) and of her alleged paramour (*l*) have been held admissible on an issue as to the legitimacy of a child of the wife, as mentioned in the last section.

(iii) *Communications*.—By the common law husband and wife were neither compellable nor competent to disclose in evidence any communications upon any matter whatsoever which had passed between them during marriage, and the death of either of them did not remove this disability in the survivor (*m*). The Evidence Amendment Act, 1853, which removed the incompetency of the husbands and wives of parties to civil proceedings, provided by sect. 3 that neither husband nor wife should be compellable to disclose any communications between them during the marriage. This section appears to have been regarded as abolishing generally this head of incompetency while reserving the right of privilege to husband and wife in all cases in respect of such communications; and the practice of the courts accords with this view.

§ 4.—State Documents.

Reports and other communications, whether oral or written, made in the course of public duty between one minister or officer of state and another are, within limits which are not very clearly defined, privileged from disclosure whenever it would be injurious to the public interests (*n*). It seems that the judge is the authority to decide whether the disclosure would be injurious or not, but on this point he will generally be guided by the opinion expressed by the head of

(i) *Burnaby v. Baillie* (1889) 42 Ch. D. 282.

(k) *Aylesford Peccage* (1885) 11 App. Ca. 1.

(l) *Burnaby v. Baillie*, *supra*.

(m) *Doker v. Hasler* (1824) R. & M. 198; *O'Connor v. Majoribanks* (1842) 4 M. & G. 435.

(n) *Beatson v. Skene* (1860) 29 L. J. Ex. 430; *McElrency v. Connellan* (1864) 17 Ir. C. L. Rep. 55; *Blake v. Pilford* (1832) 1 M. & Rob. 198.

the department in whose control the evidence is (*o*). It is also in the discretion of the judge by what evidence he will require to be satisfied of the objection made by such head of department. In some cases the minister has attended personally in court to raise the objection (*p*); in others an affidavit from his secretary or other duly authorized subordinate has sufficed (*q*). In another case it was made orally by a clerk, and the objection was overruled, but not apparently on that ground (*r*). Where the document itself is inadmissible on this ground of privilege it follows that no other evidence of its contents will be admissible (*s*).

§ 5.—Title-Deeds.

Title-deeds are also privileged from disclosure in the cases and to the extent hereinafter mentioned.

The term title-deed is well understood. It comprises documents other than deeds in the ordinary sense of that word, as for instance a will, or an agreement not under seal for the sale of an estate; and it is the contents of the document which constitute it a title-deed by their relation to some right or title which they support; hence the mere detention of a document by virtue of a lien in respect of some claim asserted by the detainer against the owner of it does not render it a title-deed in respect of the detainer's claim within the meaning of this rule (*t*).

In respect of production of title-deeds there is a great difference between the position of a party to civil proceedings and other persons.

With regard to the latter the rule was the same both at

(*o*) *Beatson v. Skene* (1860) 29 L. J. Ex. 430.

(*p*) *Ibid.*

(*q*) *H.M.S.* "*Bellerophon*" (1874) 44 L. J. Adm. 5.

(*r*) *Dickson v. Wilton* (1859) 1 F. & F. 419, 424, *sed quare*.

(*s*) *Cooke v. Maxwell* (1817) 2 St. 183; *Stace v. Griffith* (1869) L. R. 2 P. C. 420, 428.

(*t*) See below, pp. 207, 208.

common law and in equity, and has not been affected by the Judicature Acts. It is this: that a person is not compellable to produce his title-deeds for inspection (*u*). He may be compelled by a writ of *subpœna duces tecum* to bring them into court (*x*), and the party at whose instance he has been summoned may have him called on his subpœna, and without having him sworn, may ask him if he has the documents in his possession, if he has brought them there, if he is willing to produce them, and, if not, on what grounds he objects (*y*). But if the person so summoned refuses to produce the documents on the ground that they are his title-deeds, then, provided that that allegation does not appear to be manifestly false, he is privileged from producing them and cannot in that case be compelled to answer any question with regard to their contents (*z*).

With regard to parties to civil proceedings the rule at common law prior to 1851 was that they also could not be compelled by *subpœna duces tecum* or otherwise to produce their title-deeds (*a*). But by Lord Brougham's Act, 14 & 15 Viet. c. 99 s. 6, and the Common Law Procedure Act, 1854, 17 & 18 Viet. c. 125 s. 50 *seq.*, power was given to either party to obtain discovery in an action in every case where it could have been obtained by a bill in equity (*b*). The general principle in equity was that a party could obtain discovery of all such documents in his opponent's possession as did not exclusively support his opponent's case but tended to prove or support his own (*c*). Since 1875 the practice has followed

(*u*) *Harris v. Hill* (1822) 3 St. 140; *Pickering v. Noyes* (1823) 1 B. & C. 262; *Doe v. James* (1837) 2 M. & R. 47; *Doe v. Clifford* (1847) 2 C. & K. 448; *Doe v. Langdon* (1848) 12 Q. B. 711.

(*x*) *Pickering v. Noyes* (1823) 1 B. & C. 262.

(*y*) *Griffith v. Ricketts* (1849) 7 Ha. 299.

(*z*) *Davies v. Waters* (1842) 9 M. & W. 608.

(*a*) *Ibid.*; and *Pickering v. Noyes* (1823) 1 B. & C. 262.

(*b*) See Day's Com. Law Proc. Acts, 3rd ed., 1868, pp. 249 *seq.*

(*c*) See Hare on Discovery; Wigram on Discovery; *Minet v. Morgan* (1873) 8 Ch. 361.

this principle in every Division of the High Court (*d*). And this appears to imply a power to compel their production at the hearing. So far therefore as a party is concerned, there is strictly speaking no privilege for title-deeds, since he is only entitled to refuse to disclose them when they are irrelevant to his opponent's case. This right however is one which he possesses with regard to documents of every kind in his possession. But on the point of their relevancy his own statement on oath is conclusive, unless it clearly appears that he is mistaken or is deceiving the court (*e*). And if, as happens not infrequently in questions of boundary, it appears that only portions of a party's documents of title are relevant to his opponent's case, he is allowed to disclose those parts alone, sealing up the rest (*f*). These rights are chiefly illustrated by cases relating to discovery, but the party would no doubt be allowed to insist on them no less if the documents were first called for during the trial.

Whenever title-deeds are lawfully withheld under a claim of privilege, secondary evidence of their contents is admissible (*h*).

The rules relating to a document detained under lien were once unsettled, but now stand on a clear footing (*i*). The detainer cannot of course be compelled under the *subpoena duces tecum* to deliver up the document to the defeat of his lien (*k*), but he is compellable to produce it in evidence (*l*),

(*d*) *Morris v. Edwards* (1890) 15 App. Ca. 309.

(*e*) *Ibid.*

(*f*) *Jenkins v. Bushby* (1866) 35 L. J. Ch. 400; *Ponsonby v. Hartley*, W. N. (1883) p. 13.

(*h*) *Doe v. Ross* (1840) 7 M. & W. 102, explained in *Hope v. Liddell* (1855) 24 L. J. Ch. 691—694; *Doe v. Clifford* (1847) 2 C. & K. 448; *Doe v. Langdon* (1848) 12 Q. B. 711.

(*i*) *Hope v. Liddell* (1855) 24 L. J. Ch. 691.

(*k*) *Ibid.*; and *Warburton v. Edge* (1839) 9 Sim. 508.

(*l*) *Ibid.*; and *Furlong v. Howard* (1804) 2 Sch. & Lef. 115; *Brassington v. Brassington* (1823) 1 S. & St. 455; *Hunter v. Leathley* (1830) 10 B. & C. 858;

except in the case where the party calling for it is himself the person who owes to the detainor the very charges in respect of which the lien is claimed (*m*). The above general principle has been followed in bankruptcy proceedings (*n*); and it has also been embodied in express provisions in bankruptcy rules (*o*), as well as in the Companies Winding-up Act (*p*) in consequence, presumably, of the fact that the deeds held under lien were formerly regarded as entitled to all the protection of a title deed on behalf of the detainor (*q*), a rule which was specially likely to be a hindrance to the claims of creditors.

§ 6.—Privileged Admissions in Civil Cases.

An admission (*r*) made to a stranger under whatever terms as to secrecy is not protected by the law from disclosure (*s*). But when an admission has been made to the opposite side on the understanding that it is not to be used against the party making it, it is privileged. Such admissions are commonly made in the course of negotiations between the parties or their agents with a view to the compromise of the claim which is or afterwards becomes the subject of litigation, and the usual way by which the person making the

Thompson v. Moseley (1833) 5 C. & P. 501; *Lee v. Barlow* (1848) 1 Ex. 800; *Re Cameron's Coalbrook, &c. Rail. Co.* (1857) 25 Beav. 1. And of course none the less if either the party claiming the lien or the party against whom it is claimed happens to be a party to the action: *Pratt v. Pratt* (1882) 51 L. J. Ch. 838; see *Brassington v. Brassington*.

(*m*) *Kemp v. King* (1842) 2 M. & R. 437; *Re Gregson* (1858) 26 Beav. 87; but see *Fowler v. Fowler* (1881) 50 L. J. Ch. 686.

(*n*) *Re Toleman and England* (1880) 13 Ch. D. 885.

(*o*) See rule 349 under Act of 1883.

(*p*) 25 & 26 Vict. c. 89, s. 115; *Re South Essex, &c. Co.* (1869) 4 Ch. 215; *Re Capital Fire Ins. Ass.* (1883) 24 Ch. D. 408.

(*q*) *Griffith v. Ricketts* (1849) 7 Har. 299.

(*r*) For the definition of an admission as used here, see p. 101.

(*s*) *McCorquodale v. Bell* (1876) 1 C. P. D. 471, 476; *Wheeler v. Le Marehant* (1881) 17 Ch. D. 675, 681, 682.

admission secures the privilege is by stipulating that the communications are to be "without prejudice." When this condition is attached to an offer it is held to mean that while the party to whom the offer is made is entitled to accept it, in which case there is a new contract between the parties which can of course be proved and enforced, yet if the offer is not accepted, no use is to be made of it to the prejudice of the party making it (*t*). The privilege attaches equally to the answer which is made to such offer, and extends to all the subsequent communications which appear to be made in continuation of it, and in reliance on the protection thus established (*u*). The rule applies equally whether the communications be written or by word of mouth (*v*). The only qualification of the rule is that sometimes the parties may be entitled to refer generally to the fact that some negotiations have passed, in order, for instance, to explain the lapse of time (*y*). Moreover, if a party during the course of negotiations for a compromise makes admissions not with a view to such compromise but wholly independently (*z*), and still more if he commits acts, which are of themselves a ground of legal liability (such as for instance threats to infringe a patent right) (*a*), these are not privileged.

There has been some difference of judicial opinion as to whether admissions, whether express or implied from the offer of concessions, are privileged by the mere fact that they have been made in the course of negotiations for a settlement (*b*). The true view would seem to be that they are not

(*t*) *Re River Steamer Co.* (1871) 6 Ch. 822; *Walker v. Wilsher* (1889) 23 Q. B. D. 335.

(*u*) *Walker v. Wilsher*, *supra*; *Ex parte Harris, Re Harris* (1875) 44 L. J. Bkey. 33.

(*v*) *Walker v. Wilsher*, *supra*.

(*y*) *Ibid.*; and *Jones v. Foxall* (1852) 15 Beav. 390, 396, 397.

(*z*) *Waldridge v. Kennison* (1794) 1 Esp. 142; *Turner v. Railton* (1796) *ibid.* 474.

(*a*) *Kurtz & Co. v. Spence* (1887) 57 L. J. Ch. 238.

(*b*) For the privilege, *Jardine v. Sheridan* (1846) 2 C. & K. 24; against.

privileged unless it can be implied from the language or conduct of the parties that they were not intended to be disclosed, but that this inference will frequently be drawn almost as a matter of course from the nature and circumstances of the case.

In cases where a party wronged has a choice of civil or criminal remedy and where accordingly it is held lawful to enter into a compromise of the criminal liability (*c*), there seems no reason why admissions should not be privileged on the same principle as on purely civil cases as above explained.

§ 7.—Privileged Admissions in Criminal Cases.

In criminal cases it is a rule that no confession (*d*) of the defendant can be given in evidence against him unless it was voluntary; and it is held not to be voluntary if it appears to have been induced by anything in the nature of a promise or a threat held out to him by any person in authority (*e*). Such threat, promise and authority must all be understood in relation to the prosecution; that is to say, a person is deemed to be a person in authority within the meaning of this rule only if he stands in certain relations which are considered to imply some power of control or interference in regard to the prosecution; the threat must be a threat to prosecute or take some step adverse to the defendant's interests connected therewith; and the promise must be a promise to forbear from some such course. The most conspicuous example is the case of an

Nicholson v. Smith (1822) 3 St. 128; *Wallace v. Small* (1830) M. & M. 446; an intermediate position was taken by Kenyon, C. J., in *Turner v. Railton* (1796) 1 Esp. 474; and *Gregory v. Howard* (1800) 3 Esp. 113.

(*c*) *Keir v. Leeman* (1844) 6 Q. B. 308, 321; 9 Q. B. 395; and *Fisher v. Apollinaris Water Co.* (1875) 10 Ch. 297.

(*d*) For definition of confession as here used, see pp. 101, 102.

(*e*) *R. v. Baldry* (1852) 2 Den. C. C. 430, 445. The ground of the rule would seem to have been that a confession not spontaneous was not to be trusted, but the authorities show some divergence of opinion. See *R. v. Warickshall* (1783) 1 Lea. 263; *R. v. Thomas* (1836) 7 C. & P. 345; *R. v. Court*, *ibid.* 486; *R. v. Baldry*; *R. v. Reason* (1872) 12 Cox, 228.

offer of pardon held out by a secretary of state to any accomplice who will make such confession as will lead to the detection and punishment of the principal offender. A person who purports to make a confession in reliance on such an offer may fail to obtain the pardon, if it appear either that he was himself a principal or that he has failed to make a complete disclosure; but if prosecuted for his part in the crime, no admission can be given in evidence against him which appears to have been made solely in reliance on the promise of pardon (*f*). The term "person in authority" has been held to comprise any officer of justice having the custody of the defendant, as magistrate (*g*), police constable (*h*), warder (*i*) or searcher (*k*); also the prosecutor (*l*); and any person who is virtually in the position of the prosecutor's agent with regard to the custody or management of property so affected, as, for example, his wife (*m*). It is doubtful whether a medical man who is simply called in to attend to a prisoner can be deemed a person in authority (*n*). It is not necessary that the promise or threat should be actually uttered by the person in authority, if it was uttered by some one else in his presence and tacitly acquiesced in by him, so as to appear to have his confirmation and authority (*o*).

The terms of the inducement constantly involve both

(*f*) *R. v. Dingley* (1845) 1 C. & K. 637; *R. v. Blackburn* (1853) 6 Cox, 333.

(*g*) *R. v. Cooper* (1833) 5 C. & P. 535; see *R. v. Parker* (1861) L. & C. 42.

(*h*) *R. v. Pountney* (1836) 7 C. & P. 302; *R. v. Laughler* (1846) 2 C. & K. 227; *R. v. Millen* (1849) 3 Cox, 507.

(*i*) *R. v. Enoch* (1833) 5 C. & P. 539.

(*k*) *R. v. Windsor* (1864) 4 F. & F. 360.

(*l*) *R. v. Jones* (1809) R. & R. 152.

(*m*) *R. v. Taylor* (1839) 8 C. & P. 733; *R. v. Moore* (1852) 2 Den. C. C. 522; *R. v. Sleeman* (1853) Dears. C. C. 249.

(*n*) *R. v. Gibbons* (1823) 1 C. & P. 97; *R. v. Kingston* (1830) 4 C. & P. 387. The admissibility of a confession in such case might perhaps be held to turn on the question whether the prisoner believed on reasonable grounds that he was a person in authority.

(*o*) *R. v. Laughler* (1846) 2 C. & K. 225; *R. v. Taylor* (1839) 8 C. & P. 733.

threat and promise, a threat of prosecution if disclosure is not made, a promise of forgiveness if it is. The following for instance have been held to be such statements when made by persons in authority: "If you don't tell the truth . . . I will send for the constable to take you" (*p*), "If you don't tell me, I will give you in charge of the police till you do tell me" (*q*). But the threat need not be in express terms, if the intention is still clear, as in the case of the following statements: "If you don't tell, you may get yourself into trouble and it will be the worse for you" (*r*), "If you (the person in authority) forgive me, I (the prisoner) will tell you the truth." Reply: "Ann, did you do it?" (*s*). At one time almost any invitation to make a disclosure was held to imply some threat or promise, but a sounder practice has since prevailed and the words used are construed in their natural sense, so that many of the older decisions are no longer safe guides (*t*). Such expressions therefore as "I must know more about it" are no longer held to amount to a threat (*u*). There is however one form of inducement, namely, "You had better tell the truth," and equivalent expressions, which are regarded as having acquired a fixed meaning in this connection, as if a technical term, and are always held to import a threat or promise (*v*). But this construction will not prevail if such a statement is accompanied by other words which indicate that it was not intended in this sense; as "You had better, *as good boys*, tell the truth" (*y*). Inducements which consist merely of an appeal

(*p*) *R. v. Hearn* (1841) C. & M. 109.

(*q*) *R. v. Luckhurst* (1853) Dears. C. C. 245.

(*r*) *R. v. Coley* (1868) 10 Cox, 536.

(*s*) *R. v. Mansfield* (1881) 14 Cox, 639.

(*t*) *R. v. Baldry* (1852) 2 Den. C. C. 430, 445; *R. v. Reason* (1872) 12 Cox, 228.

(*u*) See last case.

(*v*) *R. v. Jarvis* (1867) L. R. 1 C. C. R. at p. 93; *R. v. Fennell* (1881) 7 Q. B. D. 147.

(*y*) *R. v. Reeve* (1872) L. R. 1 C. C. R. 362.

to a man's moral or religious feelings, however urgent, will not render a confession inadmissible (*z*). Such are the following: "I hope you will tell, because Mrs. Gurner can ill afford to lose the money" (*a*), "Don't run your soul into more sin, but tell the truth" (*b*), "You are in the presence of two police officers, and I should advise you that to any question that may be put to you you will answer truthfully, so that if you have committed a fault you may not add to it by stating what is untrue." . . . "Take care, we know more than you think" (*c*). Nor will inducements create privilege which merely promise some collateral convenience, such as permission to the defendant to see his wife (*d*), or to have the handcuffs removed (*e*). If the confession was not induced by threat or promise it is, strictly speaking, admissible even though the witness promised (*f*), or swore (*g*), not to reveal it, or even obtained it by indirect means as by making the defendant intoxicated (*h*), or intercepting and opening a letter (*i*).

An inducement may continue to operate on a man's mind for a considerable time after it was uttered (*k*); but on the other hand it may be altogether removed by subsequent statements which precede the confession, and which clearly inform the defendant that he must expect no temporal advantage from making one (*l*). In one case an inducement was held to have operated although it was made with regard

(*z*) *R. v. Gilham* (1828) Moo. C. C. 186.

(*a*) *R. v. Lloyd* (1834) 6 C. & P. 393.

(*b*) *R. v. Sleeman* (1853) Dears. C. C. 249.

(*c*) *R. v. Jarvis* (1867) L. R. 1 C. C. R. 96.

(*d*) *R. v. Lloyd* (1834) 6 C. & P. 393.

(*e*) *R. v. Green*, *ibid.* 655.

(*f*) *R. v. Thomas* (1836) 7 C. & P. 315.

(*g*) *R. v. Shaw* (1834) 6 C. & P. 372.

(*h*) *R. v. Spilsbury* (1835) 7 C. & P. 187.

(*i*) *R. v. Derrington* (1826) 2 C. & P. 418.

(*k*) *R. v. Hewett* (1842) C. & M. 534.

(*l*) *R. v. Clewes* (1831) 4 C. & P. 221.

to a different offence (*m*); but in every case it is for the judge to decide whether a confession was made in reliance on it or not.

The question not infrequently arises in what form evidence may be given of facts which have been discovered in consequence of an admission which is privileged under this rule; as where a defendant charged with theft has under the influence of threats revealed where the stolen property is hidden. It is clear that the finding of the stolen things may be proved; it is also clear that the confession as such cannot on that ground be proved; is it lawful to ask the witness a question to this effect, "*Did you in consequence of a statement which the prisoner made to you find the articles in question?*" Some authorities are in favour of the admissibility of the question, others opposed to it (*n*). On principle the latter would seem to be the right view; if the confession is wholly inadmissible, it can hardly be right to give the jury in an indirect manner so clear an indication of what the tenor of the confession was.

It does not lie on the defendant to prove the threat or promise, but is for the prosecution to satisfy the judge that any confession he tenders in evidence was voluntary (*o*).

A statement made by the defendant is not the less admissible against him because it has been made on oath in the course of other proceedings, as for instance in evidence given by him as witness at a coroner's inquest (*p*), as debtor or witness examined in the course of bankruptcy proceed-

(*m*) *R. v. Hearn* (1841) C. & M. 109.

(*n*) For the admissibility: *R. v. Griffin* (1809) R. & R. 151, diss. two judges; *R. v. Gould* (1840) 9 C. & P. 364. Against it: *R. v. Warickshall* (1783) 1 Lea. 263; *R. v. Harvey* 2 East, P. C. 658; cp. also *R. v. Mosey* (1784) 1 Lea. C. C. at p. 265 (a).

(*o*) *R. v. Warringham* (1851) 2 Den. C. C. 447, note.

(*p*) *R. v. Bateman* (1866) 4 F. & F. 1068; *R. v. Chesham*, cited in *R. v. Coote* (1873) L. R. 4 P. C. 599, 606, where the admissibility of admissions made on oath is discussed.

ings (*q*), as a witness on the prosecution of some other person (*r*), in the course of a civil suit (*s*), or in a special statutory court for the investigation of fires (*t*). Where the power to hold the examination is created by statute, the rule of the common law, that a witness is not compellable to answer questions which tend to criminate him, is held to apply unless expressly excluded. An example of this is to be found in the examination of a witness in bankruptcy proceedings in reference to the affairs of the debtor (*u*). And whenever a witness is entitled to raise this objection and does in fact raise it, but is nevertheless improperly compelled to answer, his answers so given are not admissible in evidence against him in any other proceeding (*v*). When this protection is expressly or by clear implication excluded, so that a witness is bound to answer all questions put to him, its exclusion is generally accompanied by a special provision that either in all or in certain events the evidence so given shall not be receivable in evidence against him. Examples of such provision will be found in the Corrupt and Illegal Practices Prevention Act, 1883 (*y*), the Explosive Substances Act, 1883 (*z*), the Merchandise Marks Act, 1887 (*a*). The debtor who is examined in bankruptcy presents, perhaps, the only exception to this general principle, being compellable

(*q*) 46 & 47 Vict. c. 52, ss. 17, 24, 27; *R. v. Slaggett* (1856) Dears. C. C. 656; *R. v. Scott* (1856) Dears. & B. C. C. 47; *R. v. Robinson* (1867) L. R. 1 C. C. R. 80; *R. v. Widdop* (1872) L. R. 2 C. C. R. 3.

(*r*) *R. v. Haworth* (1829) 4 C. & P. 251; *R. v. Chidley* (1860) 8 Cox, 365.

(*s*) *R. v. Garbett* (1847) 1 Den. C. C. 236.

(*t*) *R. v. Coote* (1873) L. R. 4 P. C. 599.

(*u*) *Ex parte Schofield, In re Firth* (1877) 6 Ch. D. 230; *Ex parte Reynolds, Re Reynolds* (1882) 20 Ch. D. 291.

(*x*) *R. v. Garbett* (1847) 1 Den. C. C. 236.

(*y*) 46 & 47 Vict. c. 51, s. 59. This provision is incorporated in the Municipal Elections (Corrupt and Illegal Practices) Act, 47 & 48 Vict. c. 70, s. 30.

(*z*) 46 & 47 Vict. c. 3, s. 6.

(*a*) 50 & 51 Vict. c. 28, s. 19.

to answer all questions touching his affairs and yet liable to have them used against him in subsequent proceedings (*b*).

The principle that a confession is not admissible unless voluntary has been applied by statute to statements made by a prisoner in the course of his so-called examination before a justice prior to his committal to a court of sessions or assizes for trial.

Sect. 18 of the Indictable Offences Act, 1848, 11 & 12 Viet. c. 42, provides as follows:—

After the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace or one of the justices by or before whom such examination shall have been so completed as aforesaid shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: “Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;” and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned, and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: provided always that the said justice or justices before such accused person shall make any statement shall state to him, and give him clearly to understand that he has nothing to hope from any promise of favour and nothing to fear from any threat, which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat: provided nevertheless that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person.

(*b*) *R. v. Robinson* (1867) L. R. 1 C. C. R. 80; *R. v. Widdop* (1872) L. R. 2 C. C. R. 3; *Ex parte Schofield, Re Firth* (1877) 6 Ch. D. 230, 234.

Part IV.

ADDUCTION OF EVIDENCE.



THE principle underlying the definition of the media of proof, that a party must give the best, that is, the most credible evidence that the nature of the case will admit, governs also the adduction of all testimony, or in other words, the method in which it must be brought before the court. The rules of adduction are designed to ensure that all evidence, whether oral or documentary, shall be presented to the court in such manner as to minimise, so far as general rules can ensure that end, the risk of falsehood and inaccuracy, as well as to see fair play between the parties. These rules have no regard (except to a limited extent in the case of documents) to the purpose for which the evidence is adduced. The examination of a witness must be conducted according to the same rules whether he is called to prove directly a relevant fact, as the details of a trespass or the performance of a contract in respect of which the proceeding is brought, or to report a piece of hearsay, as a declaration against interest or an admission by one of the parties. And the same is generally true of the rules of proof which govern the adduction of documents.

CHAPTER I.

EXAMINATION OF WITNESSES.

§ 1. *Examination-in-Chief.*

- (i) *Scope : Facts relevant to the Issue.*
- (ii) *Leading Questions.*
- (iii) *Examination of Witness who proves Adverse or Hostile.*
- (iv) *Question in Issue and Evidence of Experts.*

§ 2. *Cross-Examination.*

- (i) *Scope.*
 - (a) *Facts relevant to the Issue.*
 - (b) *Cross-Examination to Credit.*
- (ii) *Leading Questions.*

§ 3. *Re-Examination.*§ 4. *Refreshing Memory of Witness.*

IF a party cannot rely on any witness attending voluntarily to give evidence for him at the trial, the proper mode in civil cases of securing his attendance is for the party to cause to be issued, and serve upon the witness, a writ of *subpœna ad testificandum*, or, if he desires to secure that the witness shall not only attend but also bring into court with him any particular documents which are in his custody, a writ of *subpœna duces tecum* instead. The practice with regard to the issue and service of such writs is contained in Rules 26 to 34 of Order XXXVII. Should the witness be guilty of wilful disobedience to the *subpœna*, he is liable to attachment for contempt of court (a); he is also answerable to the party at whose instance he was served with the writ, for any damages which the latter can show that he has suffered by the loss of his evidence (b).

(a) *Barrow v. Humphreys* (1820) 3 B. & A. 598; *Scholes v. Hilton* (1842) 10 M. & W. 15; *Goff v. Mills* (1844) 2 D. & L. 23; *Crowther v. Appleby* (1873) L. R. 9 C. P. 23.

(b) *Masterman v. Judson* (1832) 8 Bing. 224; *Davis v. Lovell* (1839) 4 M. & W. 678; *Lamont v. Crook* (1840) 6 M. & W. 615.

In criminal cases the attendance of the prosecutor and witnesses for the Crown is usually secured by their being bound by recognizance by the committing magistrate under the provisions of the Indictable Offences Act, 1848, 11 & 12 Vict. c. 42 s. 20, to appear to prosecute and give evidence at the court of trial. If they do not duly appear their recognizances may be estreated and the penalties exacted. But any witness for the prosecution who has not been so bound over, and any witness for the defence, may be compelled to attend by means of a writ of *subpoena ad testificandum* or *subpoena duces tecum*, as the case may be; for disobedience to which they will be liable to attachment (c).

The usual order in which the parties adduce their evidence is this. The party on whom the burden of proof lies, having opened his case, calls his first witness and (after he has duly taken the oath or affirmed) examines him in support of it. This is called the examination-in-chief and is confined to the proof of facts relevant to the issue as defined in Part II. The opposite party then cross-examines the witness with regard to any facts relevant to the issue, whether already deposed to by him in his examination-in-chief or not, and also as to any matters which, although not relevant to the issue, are relevant to the witness's credibility as hereinafter explained. At the close of the cross-examination the witness is re-examined by the party who called him, for the purpose of giving any explanation that may be requisite as to any answers made by him in cross-examination. He then calls his next witness who is examined in like manner. When all the witnesses of the party beginning have been thus examined, his case is closed. His opponent then opens his case and calls his witnesses, who are examined in the same way, first by himself, then by his opponent and then re-examined if necessary by himself. The close of his case is

(c) Archb. Cr. Pl. 21st ed., 1893, p. 340.

ordinarily followed by his summing-up of the evidence, and then by the speech in reply of the party who began. Sometimes however the latter at the close of his opponent's evidence claims to adduce further evidence in reply to that which has been given on the other side. His right to do so depends, subject to a large discretion vested in the judge, on the following rules.

Where there are several issues, of which some lie on the plaintiff and others on the defendant, the plaintiff has the option of either confining his evidence in the first instance to the proof of the issues which lie on him or of offering evidence on all the issues (*d*). If he chooses the former alternative he leaves the defendant to make out, if he can, the issues which lie upon him, reserving to himself the right of calling, if necessary, evidence in reply. If he chooses the latter, he will not be allowed to adduce any evidence in reply, but must complete his case in the first instance (*e*).

The plaintiff is also generally entitled to give evidence in reply, even though all the issues are upon himself, when the case made against him is one of which he has had no notice on the pleadings, as where in an action of ejectment the defendant seeks to displace the contention of the plaintiff by an entirely new and affirmative case which he has not expressly pleaded (*f*). And in any case where a defendant does not lay a foundation for his own affirmative case by such a cross-examination of the plaintiff's witnesses as will give him fair notice of the points as to which they are going to be contradicted, the plaintiff will generally be allowed to give evidence in reply (*g*).

(*d*) *Shaw v. Beek* (1853) 8 Ex. 392, following *Broune v. Murray* (1825) Ry. & Moo. 254, and overruling *Rees v. Smith* (1816) 2 St. 31; and see above, p. 27.

(*e*) *Osborn v. Thompson* (1839) 2 Moo. & Rob. 254; *Jacobs v. Tarleton* (1848) 11 Q. B. 421.

(*f*) *Doe v. Gosley* (1839) 2 M. & Rob. 243.

(*g*) *Bigsby v. Dickenson* (1876) 4 Ch. D. 24; cp. *Briggs v. Aynsworth* (1838) 2 M. & R. 168.

If the judge should call and examine a witness whom neither of the parties have called, as he is at liberty to do, the parties have no right, without leave, to cross-examine the witness on the evidence so given; but permission will generally be given to a party to cross-examine the witness as to any specific points in the witness's evidence which may be adverse to his case (*h*).

§ 1.—Examination-in-Chief.

(i) *Scope : Facts relevant to the Issue.*—The scope of examination-in-chief appears from the last two Parts of this Book. The witness must speak only as to facts relevant to the issue, and he must depose to them from his own direct personal knowledge save in the exceptional cases where hearsay evidence is admissible. The only additions to be made to this statement are these, that in certain cases a witness may give evidence-in-chief as to the credibility, character and conduct of the witnesses who have already given evidence on the other side, as mentioned in the next Section (*i*) and in Chapter II, and that the proof of documents is governed by special rules to be mentioned in Chapters IV to VII of this Part.

(ii) *Leading Questions.*—The witness must not be examined in chief by means of leading questions, that is, questions calculated to lead his mind to such answers as the party examining desires. It is presumed that a witness is to some extent biassed in favour of the party who calls him, and that this fact, coupled with the party's knowledge of what his witness is prepared to say, may afford him an opportunity for unfairly shaping the testimony. The rule is however subject to some qualification, inasmuch as in some cases the reason on which it is founded fails, and in others a literal

(*h*) *Coulson v. Disborough* [1891] 2 Q. B. 316.

(*i*) Page 228.

adherence to it would bring the witness's testimony to a premature close. In the first place, as to many matters not of critical importance no mischief can be done by leading, and it is therefore desirable for the saving of time that the witness should be led. These comprise matters merely formal and introductory, such as, in most cases, the witness's name, address and profession, the circumstances which led to his connection with the transaction, and generally any matters as to which there can be no dispute. Again, even upon points which are keenly contested between the parties, the mind of a witness must frequently be led by the party who calls him, to the extent of directing his attention to the particular matters sought to be inquired into (*k*); without some indication of the point on which his evidence is required a question may easily be unintelligible. Again, where a witness's independent recollection of a matter has been exhausted, the judge will often permit him to be led to the very particulars which are sought, if from the way in which he has given his evidence it appears that it can with fairness be done (*l*); the imperfection of the witness's memory generally affords sufficient test of the true value of the testimony thus elicited.

The general effect of the rule may perhaps be summed up by saying that a party is bound not to lead his witness, in the first instance, unless it is clear that both parties regard the point on which he is questioned as uncontested, since otherwise the leading of the witness will either be, or appear to be, unfair.

(iii) *Examination of Witness who proves Adverse or Hostile.*

—(a) If a witness proves on examination-in-chief to be adverse, that is merely unfavourable, to the cause of the party calling him, the party is nevertheless not entitled to cross-examine him in any respect, nor is he generally en-

(*k*) *Nicholls v. Dowding* (1815) 1 St. 81.

(*l*) *Courteen v. Touse* (1837) 1 Camp. 43.

titled to contradict him by calling other evidence inconsistent with his testimony, except in two events, namely, when the adverse evidence was unexpected or has come upon him as a surprise (*m*), and whenever he has been virtually compelled by a rule of law to call him, as in the case of an attesting witness to a document which is invalid without attestation (*n*). But he is only entitled to so contradict him indirectly, by means of other evidence of the relevant facts; he may not call evidence to prove that the witness had made some previous statement inconsistent with his present evidence (*o*).

(b) Should a witness however show himself in the course of his examination-in-chief to be hostile to the party who has called him, the latter will be permitted by the judge to cross-examine him in a limited sense (*p*). By a hostile witness is meant not one whose evidence is merely adverse, but one who shows a bias against that party, and a disinclination to testify truthfully and candidly on his behalf (*q*). The extent to which the witness may be cross-examined is this, that he may be pressed by means of leading questions as to the relevant facts, and may also be interrogated as to any previous statement made by him inconsistent with his present evidence. But except in so far as such cross-examination may incidentally have that effect, the party may not discredit him. He may not therefore cross-examine him to show directly that the witness is unworthy to be believed on his oath, nor to show that he has given his evidence in the particular case with some corrupt or improper motive, unless perhaps where the party can show that he has been inten-

(*m*) *Ewer v. Ambrose* (1825) 3 B. & C. 746; *Bradley v. Ricardo* (1831) 8 Bing. 57; B. N. P. 297.

(*n*) *Ewer v. Ambrose*, *supra*; *Coles v. Coles* (1866) L. R. 1 P. & D. 70.

(*o*) *Ewer v. Ambrose*, *supra*; *Houldsworth v. Dartmouth* (1838) 2 M. & Rob. 153; *Melhuish v. Collyer* (1850) 15 Q. B. 878, 887.

(*p*) *Clarke v. Saffery* (1824) R. & M. 126; *Bustin v. Curlew*, *ibid.* 127.

(*q*) *Greenhough v. Eccles* (1859) 5 C. B. N. S. 786; *Coles v. Coles* (1866) L. R. 1 P. & D. 70.

tionally misled by the witness. In these respects the witness is still considered the witness of the party who has called him (*r*). The party is of course not concluded by the evidence of his own witness when he has thus shown himself hostile, but may proceed to call other evidence to contradict him as to any relevant facts. And he may do this directly, by giving evidence of any previous inconsistent statement made by the witness, provided that the circumstances of the statement, sufficient to designate the particular occasion, have been first mentioned to the witness and he has been asked whether or not he made it (*s*). But such previous statement is regarded, strictly speaking, as only displacing the previous evidence of the witness, and not as being independent evidence of the facts stated in it (*t*).

(iv) *The Question in Issue; and Evidence of Experts.*—The party who calls a witness may not ask him the question in issue. This would be inviting him to usurp the functions of the jury; it is for the witness to state the particular facts within his knowledge and for the jury to form their general conclusion from them. Thus in an action for goods sold and delivered, where the defendant pleaded in abatement that the debt was due from himself and another person jointly, the plaintiff was not allowed to ask his witness, who was called to prove the giving of the order to the defendant, the question “With whom did you deal?” (*u*). The only exception to this rule is in the case of experts, who for this

(*r*) B. N. P. 297; *Ewer v. Ambrose* (1825) 3 B. & C. 746; *Bradley v. Ricardo* (1831) 8 Bing. 57; *Melhuish v. Collier* (1850) 15 Q. B. 878–879; C. L. P. Act, 1854, 17 & 18 Vict. c. 125, s. 22; and 28 Vict. c. 18, s. 3.

(*s*) See sections cited in last note. The word “adverse” in these sections means “hostile.” See *Greenhough v. Eccles* (1859) 5 C. B. N. S. 786. At common law it was a vexed question whether the witness could under these circumstances be contradicted or not. See *S. C.* p. 805.

(*t*) *Ewer v. Ambrose* (1825) 3 B. & C. 747; *Wright v. Beckett* (1834) 1 M. & R. 414, 419; *Melhuish v. Collier* (1850) 15 Q. B. 878–881; *Greenhough v. Eccles* (1859) 5 C. B. N. S. 786, 805.

(*u*) *Bonfield v. Smith* (1844) 12 M. & W. 405.

purpose are regarded as exercising a function something between that of ordinary witnesses and that of assessors to the jury, and may be asked their opinion although it involves a general conclusion upon a question in issue (*x*). Where an expert has direct personal knowledge of the particular circumstances of the case as to which he is called to testify, as where a medical man is summoned to give evidence as to the state of health of his own patient, he is entitled to give his opinion as based on the facts as they have been observed by himself; but where he is dependent for his knowledge of the facts upon the testimony of other witnesses, he cannot express his opinion thus absolutely (*y*); the facts must then be presented to him in the form of an hypothesis, and he may be asked by each party in turn what, assuming a certain state of things to exist or such and such witness's evidence to be true, would be his opinion with regard to the matter (*z*).

§ 2.—Cross-examination.

(i) *Scope*: (a) *Facts relevant to the Issue*.—Cross-examination may, like examination-in-chief, be addressed to all facts relevant to the issue. And for the purpose of proving the issue no facts that are not relevant to it may, in strictness, be inquired into by the cross-examining party, nor may any fact that is relevant to the issue be proved by the witness by any other than the ordinary media of proof. Questions as to character and as to conduct on other occasions are not generally therefore relevant to the issue, and if a witness is asked in cross-examination whether he has not heard A, a stranger, make some statement about a certain relevant fact, and answers in the affirmative, his answer is not strictly

(*x*) *Beckwith v. Sidebotham* (1807) 1 Camp. 116.

(*y*) *R. v. McNaughten* (1843) 1 C. & K. 130, note (*a*), 135; *R. v. Searle* (1831) 1 Moo. & Rob. 75.

(*z*) *R. v. Wright* (1821) R. & R. 456; *Malton v. Nesbitt* (1824) 1 C. & P. 70, 72; *Fenwick v. Bell* (1844) 1 C. & K. 312.

speaking evidence upon the issue, if it does not fall within one of the recognized media of proof (*a*). And in like manner by the common law a witness could not be cross-examined as to the contents of a document relevant to the issue, unless the document was first produced to him and proved in accordance with the general rule as to the adduction of documents to be mentioned in Chapter IV (*b*). But this latter rule has been modified by statutes which enact with regard to civil and criminal proceedings that a witness may be cross-examined as to previous statements made by him in writing or reduced into writing relative to the subject-matter of the cause or proceeding without such production and proof (*c*).

It is difficult however to enforce strictly this principle as to cross-examination to the issue by reason of the fact that many questions which would transgress it, if directed solely to the proof of the issue, are legitimate as cross-examination to the witness's credit; and hence a party's right, if the cross-examination of his witnesses is conducted within legitimate limits, is practically confined, subject to his re-examination, to commenting to the jury on the different character and weight of the various parts of their testimony.

(*b*) *Cross-examination to Credit*.—A witness may be cross-examined not only as to the relevant facts but also as to all facts which reasonably tend to affect the credibility of his testimony. This is generally spoken of as cross-examination to credit, inasmuch as a large part at any rate of the facts which are relied on for this purpose are facts which touch the credit and good fame of the witness. But this term is perhaps somewhat misleading as suggesting that any cross-examination is permissible which tends in any way whatever to disparage the character of the witness, whereas no such

(*a*) As to admissions of hearsay statements by a party, see pp. 108, 109.

(*b*) *The Queen's Case* (1820) 2 B. & B. 286.

(*c*) 17 & 18 Vict. c. 125, s. 24 (civ.); 28 Vict. c. 18, s. 5 (crim.); and see pp. 239, 240.

cross-examination can be legitimate unless it has some reasonable bearing on his credibility. For instance in an action for goods sold and delivered, where the defendant imputes to the plaintiff some dishonest trick or overcharge, it would not ordinarily be legitimate for the defendant to cross-examine the plaintiff to show that he is not married to the woman with whom he lives and who passes as his wife, since that fact, taken by itself, has no bearing on his honesty in trade; nor to cross-examine him to show that twenty years ago he was convicted when a school-boy for stealing apples, since that, if it stands alone, is too remote to be taken into consideration by any fair man in judging of his honesty now. On the other hand recent acts of dishonesty or untruthfulness in business matters, or a series of such acts committed at intervals and extending over a considerable period, would generally be fair subject of cross-examination. It is often a difficult question of degree to determine what facts may fairly be cross-examined to as bearing upon the credibility of the witness, and it does not seem possible to lay down any more precise rules on the subject.

In cross-examining his opponent's witnesses to their credit a party is not confined either to the relevant facts or to the ordinary media of proof. He may cross-examine as to matters and conduct disconnected with the action, and as to statements made by the witness to others or by others to him or in his hearing; in short, as to any facts whatsoever, provided always that they have a reasonable bearing on the credibility of the witness in the proceeding in which he has been called to give evidence. The witness may be cross-examined also as to the contents of documents which are not produced and shown to him, though it seems that he is not compellable to answer such questions, and may demand that the documents shall be first produced and shown to him (*d*).

(*d*) *Henman v. Lester* (1862) 31 L. J. C. P. 366.

But the right to cross-examine to credit is subject to this rule, that upon facts of this description, with a few exceptions, the answers of the witness are conclusive, in this sense, that they cannot be contradicted by evidence in chief on the other side (*e*). However untrue they may be, they cannot be treated as if they were an issue in the cause. The only exceptions to this rule are these, that by the common law a party may give evidence in chief, after due cross-examination of his opponent and his witnesses, to show that they are notorious liars, or have given their testimony from corrupt or indirect motives, or that they have made previous inconsistent statements with regard to the relevant facts. To these a fourth exception has been added by statute, enabling a party to prove that his opponent or his witness has been convicted of an indictable offence, if upon cross-examination he has denied the fact. The general rule against evidence to contradict, and the exceptions to it, are based on this consideration, that whereas a witness cannot justly be expected to come into court prepared with evidence as to every act and incident of his life (which would be necessary if evidence could be given against him thereon), and it would indefinitely prolong the trial to allow evidence to be given on both sides as to such collateral matters, on the other hand a witness ought to come prepared to support his general reputation for truthfulness, to prove the purity and integrity of his motives in coming to give evidence, and to show, if it be the fact, that he has never made previous statements inconsistent with his testimony, and never been convicted (*f*).

These exceptions are considered separately in the next chapter.

(ii) *Leading Questions*.—In cross-examination the witness may be examined by means of leading questions, for the presumption is that he is biassed against the cross-examining party, and will not be tempted to follow his lead. It has

(*e*) *Baker v. Baker* (1863) 32 L. J. P. D. & A. 145.

(*f*) *Att.-Gen. v. Hitchcock* (1847) 1 Ex. 91.

even been held that this rule applies where the witness is an unwilling witness for the party calling him (*g*). But this must be taken with some qualification, for if it should appear in the course of the examination that the witness is biassed against the party who called him and desirous of assisting his opponent, it would at once become unfair for the latter to suggest to the witness the answers which he should give (*h*). If on the other hand the witness betrays a zeal against the cross-examining party or shows an unwillingness to speak fairly and impartially, he may be questioned with minuteness as to particular facts or even particular expressions; there can be no danger in leading too much where the witness is obstinately determined not to follow (*i*).

§ 3.—Re-examination.

A party is bound in the re-examination of his own witness still to observe, as in his examination-in-chief, the rules which prohibit leading questions and questions as to the issue itself.

He is entitled to ask him all questions necessary to draw forth an explanation of the full meaning of expressions used by him in cross-examination, if they are in themselves doubtful, and also of the motives by which he was induced to make use of them; but he is not entitled to introduce any new matter which does not serve to explain such expressions and motives (*k*). Thus where on an indictment for murder the prosecution called witnesses whose names were on the back of the indictment solely in order to give the prisoner the opportunity of putting questions to them, and the prisoner by his cross-examination elicited many facts in his own favour, it was held that the prosecution could not re-examine to any matters not referred to in such cross-examination (*l*). So

(*g*) *Parkin v. Moon* (1835) 7 C. & P. 408.

(*h*) *R. v. Hardy* (1794) 24 How. St. Tr. 199, at p. 659.

(*i*) Phillips on Ev., 10th ed., 1852, p. 472.

(*k*) *Queen's Case* (1820) 2 B. & B. 296, 297.

(*l*) *R. v. Bezley* (1830) 4 C. & P. 220.

where a witness for the plaintiff had been cross-examined by the defendant as to certain admissions made by the plaintiff on his examination as a witness in a former proceeding, and the plaintiff's counsel sought to ask him in re-examination whether the plaintiff had not also in the course of the same examination made other statements not relating to the same point, but which told in favour of his present contention, it was held that the question could not be put: that proof in cross-examination of a detached statement made by the party at a former time does not authorize re-examination as to all that he said at the same time, but only of so much as can be in some way connected with the statement proved (*m*). Whether the witness is a party to the proceeding or not, his re-examination as to previous statements as to which he has been cross-examined is governed by a like rule to that already mentioned in the chapter on admissions, that a party against whom an admission is given in evidence is entitled to have the whole of it presented to the jury, and not merely a part (*n*). The explanations of the witness in re-examination may of course relate not only to statements made in cross-examination as to the relevant facts but also as to those affecting the witness's credit, as for instance to show what provocation he had received for making use of a vindictive expression which he has admitted having uttered (*o*).

If in cross-examination a document has been handed to a witness merely for the purpose of his identifying it or proving the signature, no questions having been asked as to its contents, the document is not thereby made evidence, and there is consequently no right to ask questions as to its contents in re-examination (*p*).

(*m*) *Prince v. Samo* (1838) 7 A. & E. 627.

(*n*) See above, pp. 109, 111.

(*o*) *R. v. St. George* (1840) 9 C. & P. 483, 488.

(*p*) *Cope v. Thames Haven Dock Co.* (1848) 2 C. & K. 757; *Collier v. Nokes* (1849) *ibid.* 1012.

§ 4.—Refreshing Memory of Witness.

Although a witness is generally prohibited, as stated in Part II (*q*), from proving facts by evidence of his own previous statements made out of court, he is allowed to do what in effect is nearly the same thing, where the previous statement is a written one, by another rule which permits him to refresh his memory of facts formerly within his knowledge by means of any memorandum of them made by himself at or about the time of their occurrence (*r*). It is not essential that the memorandum should have been made contemporaneously with the transaction, nor is any particular limit of time prescribed; it is only necessary that it should have been made at a time when the witness's recollection of it was still clear and distinct (*s*). Nor is it essential that the witness, upon inspection of the memorandum, should have any independent recollection as to the facts referred to in it, provided he is able to say that the facts it records are true. Thus where the plaintiff called a witness to prove a payment made by himself to the witness some five years before, but of which the latter had no recollection, he put into the witness's hands a cash-book of his own containing an entry of the payment in question which purported to be initialled by the witness. The latter on inspecting the book said:—

The entry of 20*l.* in the plaintiff's book has my initials written at the time. I have no recollection that I received the money; I know nothing but by the book; but seeing my initials, I have no doubt that I received the money (*t*).

It was held that this was good proof of the payment. The ordinary mode of refreshing the witness's memory is to cause

(*q*) Chapter I, § 3, pp. 94—96.

(*r*) *Whitfield v. Aland* (1849) 2 C. & K. 1015; *Talbot v. Cusack* (1864) 17 Ir. C. L. R. 213.

(*s*) *Wood v. Cooper* (1845) 1 C. & K. 645, 646.

(*t*) *Maugham v. Hubbard* (1828) 8 B. & C. 14; *R. v. St. Martin's* (1834) 2 A. & E. 210.

him to inspect the memorandum in the witness-box. But if it should appear that he is blind (*u*), or too infirm to inspect it himself (*x*), it may be read to him. The rule applies no less on cross-examination than when the witness is being examined in chief (*y*); but there is this difference to be noted, that whereas in examination-in-chief there is probably no other ground on which the document may be used, the witness might be referred to it in cross-examination in order to test his recollection, even though it should not fulfil the conditions of a memorandum by which the witness's memory may be refreshed (*z*).

The inspection of the document by the witness does not make it evidence. Hence the fact that the document would be inadmissible, as for want of a stamp, makes no difference; it may still be used for the purpose of refreshing memory (*a*). But the opposite party is always entitled to inspect the memorandum in order to check the use made of it, and, if necessary, to examine the witness as to the time at which it was made or on any other point which may arise out of the use to which it is being put; and the judge and jury have a like right of inspection (*b*). If however the opposite counsel on thus inspecting it should refer to other entries or parts of the document, which have not been used to refresh the witness's memory, he will make them evidence against himself on the general principle by which either party who calls for and inspects a document in possession of the other side is bound to put it in (*c*). And conversely, it has been held,

(*u*) *Cutt v. Howard* (1820) 3 St. 3.

(*x*) *Vaughan v. Martin* (1796) 2 Esp. 439.

(*y*) *R. v. Ramsden* (1827) 2 C. & P. 603; *R. v. Duncombe* (1838) 8 C. & P. 369.

(*z*) *Whitfield v. Aland* (1849) 2 C. & K. 1015.

(*a*) *Maugham v. Hubbard* (1828) 8 B. & C. 14; *Gregory v. Tavernor* (1833) 6 C. & P. 280, 281.

(*b*) *Sinclair v. Stephenson* (1824) 1 C. & P. 582; *R. v. Ramsden* (1827) 2 C. & P. 603; *Gregory v. Tavernor* (1833) 6 C. & P. 280.

(*c*) *Gregory v. Tavernor* (last note); see below, p. 250.

where the document produced no impression on the witness's memory, that inasmuch as it had wholly failed of its purpose, the opposite side was not entitled to inspect it (*d*).

The term memorandum denotes the use to which the document is put, and does not import that the rule is confined to documents of any particular form. It is applicable, as the cases show, to the ordinary books of account kept by business men, depositions, a ship's log-book, and in fine to any form of writing which fulfils the terms of the rule. Nor is it necessary that the memorandum should be in the witness's own handwriting, if it was made under his personal observation or recognized by him as a correct statement at a time when the facts were fresh in his memory. Thus where a tradesman's clerk entered his master's business transactions as they occurred into a waste-book from his own knowledge, and the tradesman copied the entries day by day into a ledger in the presence of the clerk who checked them as they were copied, it was held that the latter, when called as a witness to prove certain of the transactions, was entitled to inspect the entries in the ledger as equivalent to duplicate memoranda made by himself (*e*). So, where a witness was called to give an account of a voyage, he was held entitled to refresh his memory by entries in the log-book, although not made by himself, on his proving that he had from time to time examined the entries in it while the events recorded were fresh in his recollection, and had always found them accurate (*f*). In like manner where the document is not a subsequent record at all, but forms a written scheme, so to speak, in accordance with which the transaction is executed, it may be used in like manner as a memorandum. Thus where the transaction to be proved consisted of the payment of certain sums of money to a number of workpeople, the

(*d*) *R. v. Duncombe* (1838) 8 C. & P. 369.

(*e*) *Burton v. Plummer* (1834) 2 A. & E. 341.

(*f*) *Burrough v. Martin* (1809) 2 Camp. 112.

witness who made the payments was allowed to refresh his memory by the inspection of a book in which the amounts of the wages which were to be paid had been set out, on his proving that he had had the book before him and checked each payment as he made it (*g*). So in an action for goods sold and delivered the plaintiff's clerk was allowed to prove the debt in the following way: he had not himself supplied the goods to the defendant nor entered them in his master's books; but on a certain occasion he went to the defendant and examined the book with him, article by article, sometimes the defendant and sometimes the clerk calling over the several articles, while the defendant admitted their receipt and the correctness of the amount charged for each of them in turn. It was held that the clerk was entitled to prove the debt by means of the defendant's admissions, and that as to these he was entitled to refresh his memory by reference to the book (*h*).

If a memorandum evokes no independent recollection of the transaction in a witness's mind, he is not entitled to prompt himself with it so as to be able to give evidence, unless he also brings the document itself into court (*i*). The only exception to this is where the original is lost, and the witness produces a copy which he can prove to be accurate (*k*). But for convenience' sake a witness who has his original notes in court has been allowed by the judge to refresh his memory by means of a printed copy of a report which was in all material respects a transcript from them (*l*). But where the original might have been produced it will not suffice to have in court either a copy (*m*) or extracts from it (*n*).

(*g*) *R. v. Langton* (1877) 2 Q. B. D. 296.

(*h*) *Jacob v. Lindsay* (1801) 1 East, 460.

(*i*) *Howard v. Canfield* (1836) 5 Dowl. 417; *Becch v. Jones* (1848) 5 C. B. 696.

(*k*) *Topham v. McGregor* (1844) 1 C. & K. 320; *Talbot v. Cusack* (1864) 17 Ir. C. L. R. 213.

(*l*) *Horne v. Mackenzie* (1839) 6 Cl. & F. 628.

(*m*) *Jones v. Stroud* (1825) 2 C. & P. 196.

(*n*) *Doe v. Perkins* (1790) 3 T. R. 749.

On the other hand, where the memorandum, whenever used and whether an original or not, has evoked an independent recollection in the witness's mind, the production of the original in court is not essential to the admissibility of the evidence (*o*).

By analogy to the foregoing cases expert witnesses are allowed to refresh their memory by reference to treatises and tables which they are in the habit of consulting. But as such treatises do not thus become themselves evidence, a witness is not entitled to read aloud from them, but must embody the result in his own words and give evidence on the matter upon his own responsibility (*p*).

(*o*) *Tanner v. Taylor* (1790) 3 T. R. 754; *Beech v. Jones* (1848) 5 C. B. 696.

(*p*) *Collier v. Simpson* (1831) 5 C. & P. 73; *Sussex Peerage* (1844) 11 Cl. & F. 85, 114, 117; *Cocks v. Purday* (1846) 2 C. & K. 269; *Rowley v. L. & N. W. Rail. Co.* (1873) L. R. 8 Ex. 221.

CHAPTER II.

EVIDENCE TO DISCREDIT.

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| § 1. <i>Opponent's Witness not to be believed on his Oath.</i>
§ 2. <i>His Evidence Corrupt.</i> | | § 3. <i>His Evidence Inconsistent with Previous Statement.</i>
§ 4. <i>His Conviction for an Indictable Offence.</i> |
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It was stated in the last chapter that when a party cross-examined his opponent's witness as to facts not relevant to the issue but only relevant to the witness's credibility, he is not entitled, as a general rule, if the witness denies the discrediting facts, to call evidence in chief to contradict him. To this general rule however certain exceptions are admitted, namely, where a witness is charged with being a notorious liar, with having been actuated by corrupt motives in giving his evidence or with having given evidence inconsistent with some previous statement he has made about the relevant facts; to which exceptions another has been added by statute, namely, where the witness is charged with having committed some indictable offence.

Evidence in chief with regard to facts of this description is sometimes spoken of as if it were in a sense relevant to the issue (*a*). If by this it is merely meant that such evidence, when believed, has the effect of displacing the testimony of the witness who is thereby discredited, it may be observed that the same is often true of answers extorted

(*a*) *Queen's Case* (1820) 2 B. & B. 312; *Att.-Gen. v. Hitchcock* (1847) 1 Ex. 91.

in cross-examination as to facts which do not fall under any of these heads and which are undoubtedly relevant only to the witness's credibility. On the other hand it is clear that these facts as to which the witness may be contradicted are not in any sense a part of the *res gestæ* or relevant facts in the ordinary sense. It may be doubted therefore whether expressions of this kind must not be taken merely as another way of stating that they are matters as to which the law allows evidence in chief to be given. Inasmuch as they are clearly only ancillary to cross-examination to credit, being indeed inadmissible without it (*b*), this appears to be the most convenient place in which to speak of them.

§ 1.—Opponent's Witness not to be believed on his Oath.

A party may call witnesses to say that in their opinion a witness who has testified on the other side is not to be believed on his oath (*c*). The witnesses who give this evidence must not testify as to particular acts of criminality or misconduct, but confine themselves to evidence of the general character and reputation in point of veracity of the witness (*d*), and must speak from their own personal knowledge upon the matter (*e*).

§ 2.—His Evidence Corrupt.

A party may call evidence to show that a witness on the other side has given his evidence in the particular case from some corrupt or indirect motive. Thus he may show that the witness has offered bribes to others to give evidence, or that some one has bribed him, (though not that some one has

(*b*) *Queen's Case* (1820) 2 B. & B. 312, 313; *Carpenter v. Wall* (1840) 11 A. & E. 803.

(*c*) *R. v. Brown* (1867) L. R. 1 C. C. R. 70.

(*d*) *R. v. Rudge* (1805) Pea. Add. Ca. 232; *Sharpe v. Scoging* (1817) Holt, N. P. C. 541.

(*e*) *Ibid.*; and *Mawson v. Hartsink* (1802) 4 Esp. 102.

offered ineffectually to bribe him (*f*)), or that some one has threatened him (*g*), or that he has been induced to give evidence by some indirect motive, as malice (*h*) or revenge (*i*). But the mere attempt by a witness to dissuade another from giving evidence on the other side does not come within the rule (*k*).

The rule is well illustrated by the case of *R. v. Yewins* (*l*). There the prisoner was indicted for stealing wheat; the principal witness against him was a boy of the name of Thomas, his apprentice; the defendant's counsel asked Thomas in cross-examination, (a) whether he had not been charged with robbing his master, and (b) whether he had not afterwards said he would be revenged on him and would soon fix him in Monmouth Gaol. He denied both. The defendant's counsel then proposed to prove, (a) that he had been charged with robbing his master, and (b) that he had spoken the words imputed to him. Lawrence, J., ruled that the witness's answer must be taken as to the former, but that the defendant might call evidence to prove that he had uttered the words imputed to him.

§ 3.—His Evidence inconsistent with previous Statement.

It is a rule of the common law that evidence may be given to show that a witness, though not a party to the proceedings, has on some previous occasion made some statement concerning relevant facts inconsistent with his present testimony, if upon cross-examination he denies such previous statement (*m*). If the witness were a party the evidence would

(*f*) *Att.-Gen. v. Hitchcock* (1847) 1 Ex. 91, 94, 103.

(*g*) *Semble: Melhuish v. Collier* (1850) 15 Q. B. 878.

(*h*) *Att.-Gen. v. Hitchcock* (1847) 1 Ex. 91, 94, 100.

(*i*) *R. v. Yewins* (circa 1811) 2 Camp. 638.

(*k*) *Harris v. Tippet* (1811) 2 Camp. 637.

(*l*) 2 Camp. (circa 1811) 638.

(*m*) *Crowley v. Page* (1837) 7 C. & P. 789; *Andrews v. Askey* (1837) 8 C. & P. 7; *Att.-Gen. v. Hitchcock* (1847) 1 Ex. 91.

be admissible on another ground, since the relevant facts may always be established through the medium of an admission proved to have been made by the opposite party, even though he has not been called as a witness and cross-examined to it; but previous statements of a witness who is not a party cannot be proved except under the present head of evidence. Doubts having arisen whether such evidence could also be given where the witness neither denied nor distinctly admitted that he had made such previous statements, it was provided by statute that in such case also like evidence might be given. By the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125, s. 23, it is enacted that—

If a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the cause and inconsistent with his present testimony does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement (*n*).

At common law it was also held not only that a witness could not be cross-examined as to the contents of a previous written statement unless the document was first shown to him and he admitted it to be in his handwriting, but also that, once that admission made, the party cross-examining was entitled to put it in evidence to contradict him, although the witness might not have had any opportunity of explaining it (*o*). To amend the law in both these respects it was enacted by sect. 24 of the same statute that—

A witness may be cross-examined as to previous statements, made by him in writing, or reduced into writing, relative to the subject-matter of the cause, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention

(*n*) A similar provision as to criminal proceedings is enacted by 28 Vict. c. 18, s. 4.

(*o*) *Queen's Case* (1820) 2 B. & B. 286: cp. p. 226.

must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him: provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit (*p*).

§ 4.—His Conviction for an Indictable Offence.

By analogy to the cases mentioned above, it has by sect. 25 of the same statute been provided that—

A witness in any cause may be questioned as to whether he has been convicted of any felony or misdemeanour, and, upon being so questioned, if he either denies the fact or refuses to answer, it shall be lawful for the opposite party to prove such conviction (*q*).

This case differs from the others mentioned in this chapter in this, that a witness's conviction for a felony or misdemeanour is not necessarily relevant to his credibility. It may have taken place many years previously and have been for an offence that has no reasonable bearing on the veracity of his testimony now. It would seem therefore that the meaning of the section must be this, that whenever a witness's conviction is so relevant to his credibility that it is reasonable to cross-examine him in respect of it, it shall be lawful, if he deny it, to call evidence to contradict him.

(*p*) A similar provision as to criminal proceedings was enacted by 28 Vict. c. 18 s. 5.

(*q*) A similar provision as to criminal proceedings has been enacted by 28 Vict. c. 18 s. 6.

CHAPTER III.

CORROBORATIVE EVIDENCE.

§ 1. *Required by Prudence.*

§ 2. *Required by Law.*

THIS head of evidence does not fall very symmetrically under any of the titles into which this book is divided, since it is concerned solely with the quantity of testimony relating to the relevant facts which may or must be adduced in order to produce belief concerning a fact in issue. As however it is intimately connected with the credibility of witnesses, this is perhaps on the whole the fittest place to interpose it, following the subject of Evidence to Discredit.

Whenever the evidence of a witness needs confirmation either because in fact it may not by itself produce belief, or because by a rule of law corroborative evidence is made indispensable, such evidence is admissible.

Although the effect of corroborative evidence is to support the veracity of some witness who has already testified, it is not proper to address it in form directly to that end. A witness called to corroborate the evidence of a former witness may not ordinarily be asked if that witness is a truthful man, or if the evidence he has given is accurate. It is only occasionally when a number of witnesses are called to speak to the same point, that for convenience' sake and to save time the judge will sometimes allow them to be examined thus: "Have you heard the evidence given by A (a previous witness)?" "Do you agree with it?" In other cases corroborative evidence is addressed directly to the proof of the relevant facts or some part of them in the ordinary way.

§ 1.—Required by Prudence.

When a witness who is called to give evidence to some relevant fact is not cross-examined with regard to it, the party for whom he is called is ordinarily entitled, unless the omission is clearly due to an oversight or his opponent has indicated that he intends to challenge the evidence in some other way, to assume that the evidence is not questioned, and in such case corroborative evidence is superfluous and on that ground improper. If on the other hand the evidence is questioned by cross-examination, it at once becomes permissible to corroborate it by further evidence. The application of this rule is so familiar that it requires no illustration.

There are some cases however where corroborative evidence, though not essential in law, is in practice considered almost indispensable. Such are claims to establish a debt or a gift as against the estate of a deceased person, in which it is a rule, not of law but of prudence, in order to prevent perjury and to protect dead men's estates from unfounded claims, that credence shall not be given to the unsupported testimony of the claimant, unless his evidence brings the clearest conviction to the tribunal which has to try the question (*a*). On the same grounds in criminal prosecutions the court requires that the evidence of an accomplice shall be corroborated (*b*). And the same holds good of the evidence of a petitioner who in proceedings for divorce or judicial separation alleges cruelty or adultery.

§ 2.—Required by Law.

In certain cases corroboration is rendered necessary by a rule of common law or by statute.

(i) *Perjury*.—In prosecutions for perjury it is essential that the principal witness called for the prosecution to prove

(*a*) *Re Finch* (1882) 23 Ch. D. 267; *Re Garnett* (1885) 31 Ch. D. 1; *Re Hodgson* (1885) *ibid.* 177.

(*b*) *R. v. Wilkes* (1836) 7 C. & P. 272; *R. v. Stubbs* (1855) Dears. 555.

the defendant's false swearing, should be corroborated; the reason being that otherwise the jury would have the perilous task of deciding between the oath of the witness on one side and that previously sworn by the prisoner on the other (*c*).

(ii) *Treason*.—In prosecutions for high treason, save where the offence charged is the compassing or imagining the death or bodily injury of the sovereign, it is necessary that there should be at least two witnesses, either both to one overt act, or one to one overt act and the other to another (*d*).

(iii) *Affiliation*.—It is provided by the Bastardy Acts that in affiliation proceedings the evidence of the mother must be corroborated in some material particular by other evidence (*e*).

(iv) *Breach of Promise of Marriage*.—By sect. 2 of the Evidence Further Amendment Act, 1869 (*f*), it is provided that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless her or his testimony shall be corroborated by some other material evidence in support of such promise.

(v) *Offences against Girls and Women*.—In prosecutions under sects. 2, 3 or 4 of the Criminal Law Amendment Act, 1885 (*g*), no conviction can be had on the evidence of one witness uncorroborated.

Corroboration always implies the testimony in some form of an independent mind (*h*). The independent mind may be that of a witness who is no party to the proceedings, or that

(*c*) *R. v. Muscott*, 10 Mod. 192.

(*d*) 7 & 8 Will. 3, c. 3, ss. 2 and 4; 39 & 40 Geo. 3, c. 93; 5 & 6 Vict. c. 51, s. 1.

(*e*) 8 & 9 Vict. c. 10, s. 6; 35 & 36 Vict. c. 65, s. 4; *R. v. Pearce* (1852) 17 Q. B. 902, note (*a*); *Cole v. Manning* (1877) 46 L. J. M. C. 175.

(*f*) 32 & 33 Vict. c. 68; *Bessela v. Stern* (1877) 2 C. P. D. 265; *Wademan v. Walpole* [1891] 2 Q. B. 534.

(*g*) 48 & 49 Vict. c. 69.

(*h*) *R. v. Braithwaite* (1859) 1 F. & F. 638.

of the party himself against whom the evidence is tendered. In civil cases therefore corroboration does not necessarily involve calling a second witness, since the opposite party may have made admissions in his answers to interrogatories or to a notice to admit facts, or he may at the hearing make admissions of facts or documents which may amount to corroboration. In criminal cases, where no admissions can be made, it seems to be clear that there can be no corroboration without a second witness (*i*). It is not however necessary that the corroborating witness should prove the whole fact in issue, or cover with his evidence precisely the same ground as the witness he corroborates; his evidence is deemed corroborative if it proves some material part or circumstance of the fact in issue (*k*).

(*i*) *R. v. Yates* (1841) C. & M. 132; *R. v. Hook* (1858) D. & B. 606; *R. v. Shaw* (1865) L. & C. 579. The earlier ruling in *R. v. Mayhew* (1834) 6 C. & P. 315, seems erroneous.

(*k*) *R. v. Hook* and *R. v. Shaw*, *supra*. This also seems to be the meaning of Tindal, C. J., in *R. v. Parker* (1842) C. & M. 639.

CHAPTER IV.

PRIMARY EVIDENCE OF PRIVATE DOCUMENTS.

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| § 1. <i>Production of Document.</i>
(i) <i>Production by the Party him-
 self.</i>
(ii) <i>Production by his Opponent.</i>
(iii) <i>Production by a Third Person.</i> | § 2. <i>Proof of Document when Modern.</i>
(i) <i>Proof by Ordinary Witnesses.</i>
(ii) <i>Proof by Attesting Witnesses.</i>
(iii) <i>Proof by Notice to Admit.</i>
§ 3. <i>Proof of Document when Ancient.</i> |
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For the purpose of adduction documents are divided into public and private. Generally those which are classed as public are kept in some official or special custody and are not produced in court but proved by means of examined or office copies. They are considered separately in Chapter VII of this Part. All other documents are classed as private, and their proof is the subject of this and the two following chapters.

With regard to the adduction of private documents the principle that the best evidence must be given that the nature of the thing will admit of is exhibited first of all in the rule that the contents of documents must be brought to the cognizance of the judge and jury by the production of the originals themselves for inspection in court. This is called primary evidence, in contrast with secondary evidence by means of copies or oral testimony, which is only admissible under special conditions to be mentioned in Chapter VI. It is not however sufficient to merely produce the original for inspection in court; it is also necessary to prove it, by giving evidence that all conditions of its validity or authenticity, as signing, sealing, delivery and attestation, or such of them as may be applicable to the particular document, were

duly performed; and the nature of this proof differs in important particulars according as the document is or is not ancient, that is thirty years old or more. The present chapter deals with primary evidence of private documents both modern and ancient.

§ 1.—Production of Document.

The original document must be produced in court for inspection (*a*).

No similar rule exists in regard to chattels; it has never been held, for instance, when the issue is as to the soundness of a horse, or the equality of goods to sample, that the chattel alone is primary evidence, so as to render necessary its production in court for the inspection of the jury (*b*). But it sometimes happens that a document, instead of being a *res gesta*, as a contract or a libel, or the medium of proof of some fact, as an admission or a declaration, in which case its terms are all-important, is but the subject of conflicting claims touching its possession or existence, as any other chattel might be; and in such case the document is with regard to production regarded as an ordinary chattel, and there is no legal obligation to produce it (*c*). But generally it may be said that wherever there is an issue as to the precise terms, or as to the genuineness of a document, the original must be produced.

This is well illustrated by the case of *R. v. Elworthy* (*d*). The defendant, a solicitor, had procured a loan for a client named Cannon, one of the terms of the loan being that Cannon should make a certain statutory declaration. Cannon was subsequently charged with perjury in respect of certain

(*a*) *Queen's Case* (1820) 2 B. & B. 286; *Strother v. Barr* (1828) 5 Bing. 136, 144; *Vincent v. Cole* (1828) M. & M. 257; *Boosey v. Davidson* (1849) 13 Q. B. 257.

(*b*) *R. v. Francis* (1874) L. R. 2 C. C. R. 128, 133. See above, p. 76.

(*c*) *Bucher v. Jarratt* (1802) 3 B. & P. 143, 146.

(*d*) (1867) L. R. 1 C. C. R. 103.

statements contained in the declaration, and on his trial Elworthy was called as a witness for the prosecution. Thereupon Cannon, to exonerate himself from the charge against him, asked Elworthy in cross-examination whether there had not been a draft of the statutory declaration which he, Cannon, had seen and corrected in the very particulars in which its truthfulness was impugned, and whether Elworthy had not engrossed the declaration in disregard of the corrections and allowed Cannon to swear it under the impression that it was in accordance with the corrected draft. Elworthy however denied that there had ever been such a draft, and for this statement he was now charged with perjury. In support of the indictment Cannon and his wife tendered oral evidence of the contents of the draft declaration, and after objection on the ground that the defendant Elworthy had had no notice to produce the document, the evidence was admitted. But it was held by the court that it was inadmissible. Had the question been only as to the existence of the draft it might have been otherwise, but the case having taken such a course that the precise terms of the draft and of the alterations made in it were material the ordinary rule of production must be observed. So in prosecutions for forgery the document alleged to be forged must be produced (*c*).

The rule has often been brought into play in cases where one of the parties seeks to prove a contract by oral evidence, while the other contends that it has been reduced into writing which must be produced. This kind of contest has most frequently arisen either where the document was unstamped and each party was desirous of avoiding himself or of throwing on his opponent the obligation of paying the penalties prescribed by the Stamp Acts, or in connection with claims by contractors in respect of extras. If one of the parties, having in examination-in-chief proved a contract without

(*c*) *R. v. Haworth* (1829) 4 C. & P. 254.

reference to any document and therefore apparently oral in its terms, is afterwards compelled in cross-examination to admit that the contract was reduced to writing, his former evidence is displaced and he must produce the document in order to prove his case. If on the other hand he makes out a *prima facie* case without reference to any written contract, it lies on the other party, if he contends that the contract was reduced into writing, to produce it as part of his own evidence (*f*). Thus where in an action for work and labour the plaintiff proved a *prima facie* case and it was first suggested by one of the defendant's witnesses that the terms of employment were contained in writing, the plaintiff was held not obliged to put in the agreement, which was unstamped (*g*). Had the plaintiff been cross-examined on the point and admitted the existence of the document he, and not the defendant, would have been compelled to put it in (*h*). So in an action for extras, if it appear in the course of the plaintiff's case that the principal work was done under a contract in writing, the plaintiff is bound to produce the writing to show whether the work sued for was extra of it or not (*i*), unless he is in a position to show clearly that the so-called extras were done under an order entirely distinct from the original contract (*k*). So in actions based on agreements of tenancy, if the party setting up the agreement admits that its terms were reduced to writing, oral evidence may not be given to show who was the tenant (*l*), nor what was the amount of the agreed rent (*m*), nor that rent had accrued due at a particular date (*n*). But it has been held that the mere relationship of

(*f*) *R. v. Padstow* (1832) 4 B. & Ad. 208, 210.

(*g*) *Fidler v. Ray* (1829) 6 Bing. 332.

(*h*) *Brewer v. Palmer* (1800) 3 Esp. 213.

(*i*) *Vincent v. Cole* (1828) M. & M. 257; *Buxton v. Cornish* (1844) 12 M. & W. 426.

(*k*) *Reid v. Batte* (1829) M. & M. 413.

(*l*) *R. v. Rawden* (1828) 8 B. & C. 708.

(*m*) *R. v. Merthyr Tydvil* (1830) 1 B. & Ad. 29.

(*n*) *Augustien v. Challis* (1847) 1 Ex. 279.

tenancy may, notwithstanding the existence of an agreement in writing, be proved by the occupation of land and payment of rent by A to B (*o*). Where the existence of a written contract is admitted by a witness, the cross-examining party is entitled to ask whether such agreement relates to the subject-matter of the suit, for although he thus seeks to obtain oral evidence as to the contents of a written document, it is clear that to this extent oral evidence is indispensable (*p*).

The document to be produced may be in the possession either of the party who intends to adduce it in evidence, or of his opponent, or of a stranger to the proceeding.

(i) *Production by the Party himself*.—In the first case, there can be no difficulty about its production; the party will himself bring it into court.

(ii) *Production by his Opponent*.—If the document is in the possession or exclusive control of his opponent, the ordinary mode by which he obtains its production is to give the latter, a reasonable time before the trial, notice to produce it at the trial, and then at the trial to call for its production accordingly. In civil cases there is a prescribed written form for such a notice; in criminal cases it is also usually written, though an oral notice is valid (*q*); but it is not applicable to the prosecutor, since the Crown and not he is the party suing.

Inasmuch as the purpose of a notice to produce is not to give the opponent time to prepare evidence to explain or rebut the original document, but merely to enable him to have it

(*o*) *R. v. Holy Trinity* (1827) 7 B. & C. 611; *Doc v. Harvey* (1832) 8 Bing. 239, 242; *qu. Cotterill v. Hobby* (1825) 4 B. & C. 465. This exception seems contrary to principle, since although payment of money from A (the tenant) to B (the landlord) may be proved, directly it is called "rent" the relationship called tenure is implied, which involves a reference to the agreement of tenancy. See per Best, C. J., in *Strother v. Barr* (1828) 5 Bing. 136, at p. 152.

(*p*) *Curtis v. Greated* (1834) 1 A. & E. 167.

(*q*) *Smith v. Young* (1808) 1 Camp. 439; *cp. Att.-Gen. v. Le Marchant* (1772) 2 T. R. 201, note (*a*).

in court and exclude the argument that the party who serves it has not taken all reasonable means to procure its production (*r*), the notice should be served within a reasonable time before the trial as measured by this object. What is a reasonable time must depend on the circumstances of the case, as the nature and age of the document, its probable custody, and the residence and convenience of the party or other person in whose custody it is (*s*). The notice must specify with reasonable particularity the documents required to be produced. A full specification comprises a short description of the document (as deed, will, letter, &c.), together with a statement of its date and the names of the parties. Where these cannot all be given, the party should still identify the documents required as far as possible, by giving such of these particulars as he is in a position to do, coupled, if necessary, with others as to subject-matter, &c. (*t*).

A form of notice to produce will be found in Appendix B. (*u*).

The party who produces a document when called for is entitled to insist that it shall be put in evidence by his opponent, if the latter not only causes it to be so produced but also makes use of it, (as by inspecting its contents), provided of course that it is material to the issue; and it is for the judge to say whether it has been so used as to make it fair that it shall be given in evidence by the party who has called for it (*r*).

If the opponent, having a document in his possession, refuses to produce it when called upon to do so, he is precluded from afterwards giving the document in evidence himself for

(*r*) *Dwyer v. Collins* (1852) 7 Ex. 639.

(*s*) *Lawrence v. Clark* (1845) 14 M. & W. 250.

(*t*) *Morris v. Hauser* (1841) 2 M. & R. 392 ("all letters between the parties between the years 1837 and 1841"); *Conybeare v. Farries* (1869) L. R. 5 Ex. 16 ("all letters relating to your tenancy of a room").

(*u*) See p. 313.

(*v*) *Sayer v. Kitchen* (1794) 1 Esp. 209; *Wharam v. Routledge* (1805) 5 Esp. 235; *Wilson v. Bowie* (1823) 1 C. & P. 8; *Calvert v. Flower* (1836) 7 C. & P. 386, and see above, p. 232.

any purpose (*x*). Since it is generally to the interest of a party against whom a document is intended to be adduced that his opponent should have no opportunity of misstating its terms, and the refusal to comply with the notice to produce a document in his possession has the effect of letting in secondary evidence, such notice is generally effectual to insure the production of the document. It sometimes however happens that the party in possession of the document may have reasons for withholding it which outweigh that disadvantage, as for instance where the document has been dishonestly tampered with. In such cases the notice cannot be relied on, and in civil cases the production of the document must then be secured by the service on the party of a writ of *subpoena duces tecum*, the wilful disobedience to which involves liability to proceedings for contempt, as well as to an action for any damages occasioned by the withholding of the evidence (*y*). In criminal cases documents which tend to compromise the defendant are generally in the custody of the prosecution.

In civil cases a party is enabled to ascertain before the trial what material documents are in the possession of his opponent, by means of the process of discovery and inspection, which is regulated by Order XXXI of the Rules of the Supreme Court. Rule 12 provides that—

Any party may without filing any affidavit, apply to the court or a judge for an order directing any other party to any cause or matter to make discovery on oath of the documents which are or have been in his possession or power, relating to any matter in question therein. On the hearing of such application the court or judge may either refuse or adjourn the same, if satisfied that such discovery is not necessary, or not necessary at that stage of the cause or matter, or make such order, either generally or limited to certain classes of documents, as may in their or his discretion be thought fit. Provided that discovery shall not be ordered when and so far as the court or judge

(*x*) *Doe v. Hodgson* (1840) 12 A. & E. 135; *Collins v. Gushon* (1860) 2 F. & F. 47; cp. R. S. C. Ord. XXXI r. 15; and see p. 285.

(*y*) See p. 218.

shall be of opinion that it is not necessary either for disposing fairly of the cause or matter or for saving costs.

RULE 15. Every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the court or judge shall deem sufficient for not complying with such notice: in which case the court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the court or judge shall think fit.

The forms relating to discovery and inspection are set out in Appendix B (z).

(iii) *Production by a Third Person*.—Should the document be in the possession of a stranger who cannot be relied on to produce it voluntarily at the party's request, the latter may by means of a writ of *subpœna duces tecum* compel his attendance with the document at the trial (a). In criminal cases, whenever the defendant has been committed for trial by a coroner or justices, the prosecutor and the witnesses for the prosecution are bound by their recognizances to appear and give evidence at the trial, and this involves the obligation to produce any documents in their possession given in evidence before the justices (b). But if it should be considered desirable that they should be compelled to produce other documents also in their possession, and in any case where witnesses have not been so bound by recognizances, they may be served with writs of *subpœna duces tecum* (c).

(z) Pages 313, 314.

(a) For the practice as to *subpœnas* in civil cases, see Order XXXVII rr. 26—34.

(b) The documents ought not to be annexed to the depositions; Stone's Justices' Manual, 25th ed., 1889, p. 11, note (c).

(c) For the practice see Archbold's Cr. Plead. 20th ed., 1886, p. 336.

If any person having a particular document in his possession in court, is sworn as a witness in the case, he may be ordered by the judge to produce the document, although he has not been served with a *subpoena duces tecum* (*d*). And it seems that in a criminal case any person in court may be ordered to give evidence as a witness (*e*).

§ 2.—Proof of Document when Modern.

Assuming that the original document which the party seeks to give in evidence has been duly produced in court as mentioned in the last section, it has next to be proved; that is, evidence must be given to show that it satisfies the conditions necessary to give it the force ascribed it, as that it was written, signed, sealed, delivered and attested, as the case may be, by the persons and at the times that it purports or is alleged to have been. Moreover, if it is a document that requires a stamp, it will not be admissible in evidence unless it is duly stamped; but this condition is so special that it is reserved for a separate chapter.

With regard to the proof of documents however it is to be noted that the proof required of a particular document may vary to some extent according to the purpose for which it is tendered. For instance in order to prove a deed of grant containing certain recitals, it will be necessary, if it is tendered in evidence to establish the grant, to prove that it was duly signed, sealed and delivered; whereas if it were tendered only to prove some fact admitted in the recitals, it will not be absolutely necessary to prove any of these conditions, if it can be shown that the recitals were inserted or adopted by the party

(*d*) *Snelgrove v. Stephens* (1842) C. & M. 508. *Quære*, in the case of a party or stranger not sworn. See *Att.-Gen. v. Le Marchant* (1772) 2 T. R. 201 (a); *Law v. Wells* (1792) Pea. 93.

(*e*) *R. v. Sadler* (1830) 4 C. & P. 218.

against whom they are tendered. But in the latter case it is not really relied on *as a deed* at all. This distinction between a document tendered as an operative instrument and the same document used merely as a medium of proof of some fact referred to in it, must be borne in mind throughout this Part (*f*).

The only exception (subject to the above qualification) to the rule that a document must be duly proved is where a party tenders in evidence a document which is produced by his opponent and under which the latter himself claims some interest which implies its valid execution. In such case the party tendering the document is not exonerated from complying with the provisions of the Stamp Acts, but he is dispensed from proving as against his opponent the other conditions necessary to the admissibility of the document in evidence. Formerly the rule was that the mere production of a document by the opposite party was in all cases deemed to be an admission by him of the due performance of these conditions; this was superseded by the rule that the execution of the document must be proved in every case; and this in its turn has given way to the present rule which is less extreme than either of the others and is based on the principle that a party shall not be allowed at once to approve and reprobate the same document (*g*). The rule does not apply therefore if the party against whom the document is tendered has ceased to claim any right under it (*h*). But the decisions are not uniform as to its limits in other respects; in one case the mere detention before trial of a deed by one

(*f*) See as to this, Part II. Chap. IV.

(*g*) *Pearce v. Hooper* (1810) 3 Taunt. 60; *Orr v. Morice* (1821) 3 B. & B. 139; followed in *Bradshaw v. Bennett* (1831) 1 M. & R. 143; and *Carr v. Burdiss* (1835) 1 C. M. & R. 782.

(*h*) *Vacher v. Cocks* (1830) 1 B. & Ad. 145; *Carr v. Burdiss*, *supra*, per Parke, B., at pp. 784, 785; cp. *Collins v. Baynton* (1841) 1 Q. B. 117. In *Burnett v. Lynch* (1826) 5 B. & C. 589, the court decided the point of evidence on a different ground to that acted on by the C. J. at the trial.

of the parties for the purpose of preventing his opponent from giving it in evidence against him was treated as a claim of interest under it (*i*); while in another case the opinion was expressed that the interest claimed under the deed must be an interest in the subject-matter of the cause (*k*). The leading case of *Pearce v. Hooper* however appears to show that the true rule is as first above stated, although undoubtedly it will generally be much easier for a party to prove that his opponent is claiming an interest under a document when he is doing so in the cause itself.

The rules laid down in Parts II and III are in the main applicable to the proof of documents, whether they are tendered as *res gestæ* or merely as media of proof of some fact. Thus it was held that a party was not entitled to prove that certain books were receivers' books by merely proving that other similar books, not necessarily connected with them, were of that character (*l*). So, the posting of letters may be proved by entries made by deceased clerks in the course of their duty (*m*); and the copy of a document, the original of which is withheld by the other side, may be proved in the like manner (*n*). An attesting witness may refresh his memory as to the execution of a deed which he is called to prove by inspecting his signature to the attestation clause (*o*). And in like manner there are many facts connected with the proof of documents as to which judicial notice and presumptions are applicable, as will be seen hereafter. In a few cases however certain special media of proof may be resorted to in the proof of documents, which are not admissible for other purposes. Thus, if the genuineness of a deed or will is impeached on the ground of forgery

(*i*) *Doe v. Heming* (1826) 6 B. & C. 28.

(*k*) *Rearden v. Minter* (1813) 5 M. & G. 204.

(*l*) *Doe v. Thynne* (1808) 10 East, 206, 208; see below, p. 269.

(*m*) *Hagedorn v. Reid* (1813) 3 Camp. 377; see below, p. 263.

(*n*) *Pritt v. Fairclough* (1812) *ibid.* 305; see below, p. 286.

(*o*) *Maugham v. Hubbard* (1828) 8 B. & C. 14, 16; see p. 265.

or fraud, and it is alleged that deceased attesting witnesses were accomplices therein, evidence is admissible of their good character (*p*). So the proof of the execution of a document by the mere proof of the handwriting of a deceased attesting witness involves a special exception to the general rule against hearsay (*q*). Another important exception is admitted in the case of wills (*r*). Wherever there is a question as to the validity of a will (*s*), or as to the date of an erasure or interlineation (*t*), or as to the contents of a will that has been lost or destroyed (*u*), declarations made by the testator are admissible to prove these facts (*x*).

The present section deals with modern private documents, namely, those less than thirty years old. The rules contained in it may however, where they can, be applied equally in the proof of ancient documents, that is to say, those which are thirty years old or more; but for the proof of the latter special facilities are provided by other rules which are the subject of the next section.

There are three distinct modes of proving modern private documents, namely, proof by ordinary witnesses, by attesting witnesses where the document has been attested, and by notice to admit. The first two are applicable in either civil or criminal proceedings, the third in civil only. It will be convenient to describe them in this order, although a notice

(*p*) See p. 266.

(*q*) See pp. 265, 266.

(*r*) See pp. 259, 286.

(*s*) *Doe v. Allen* (1799) 8 T. R. 147; *Ellis v. Hardy* (1836) 1 Moo. & Rob. 525.

(*t*) *In the Goods of Sykes* (1873) L. R. 3 P. & D. 26; *Dench v. Dench* (1877) 2 P. D. 60; see below, p. 259.

(*u*) *Johnson v. Lyfford* (1868) L. R. 1 P. D. 546; *Sugden v. Lord St. Leonards* (1876) 1 P. D. 154; see below, p. 286.

(*x*) The credibility of this class of declarations has been said to depend on their accompanying an act done, namely, the execution of the will: *Johnson v. Lyfford*, at p. 547; but a better ground seems to be the testator's peculiar knowledge and the absence of any motive on his part save to speak the truth: *Sugden v. Lord St. Leonards*, at pp. 224, 225.

to admit is to this extent made the first of these three modes of proof, that, where it is applicable, a party is liable to recover no costs of proving a document unless he has first had resort to it.

(i) *Proof by Ordinary Witnesses.*

(a) *Handwriting or Signature.*—The ordinary mode by which a person authenticates any document as being his own act or communication is by writing at the foot of it his own name, called his signature. But save where it is so prescribed by statute, this is not the sole mode of authentication or signature. It has been held that a printed bill-head containing a man's name may be a good memorandum signed by him within the meaning of the Statute of Frauds, if he writes the body of the memorandum beneath it (*y*).

Handwriting or signature is ordinarily proved in one of the following ways (*z*).

The best evidence of all, assuming of course that the witness is not unfriendly, is to call either the person who wrote it or some person who saw him write it, and so prove the fact by direct evidence.

Secondly, when such evidence is not available, some witness must be called who can swear to the identity of the handwriting from his previous knowledge of other handwriting of the same person. That knowledge may have been acquired by seeing the person write, in which case it will be stronger or weaker according to the number of times and the periods and other circumstances under which the witness has seen him write; but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such cases), even if he has seen him write but once, and then

(*y*) *Saunderson v. Jackson* (1800) 2 B. & P. 238; *Schneider v. Norris* (1814) 2 M. & S. 286; *Tourret v. Cripps* (1879) 48 L. J. Ch. 567.

(*z*) *Doe v. Suckermore* (1836) 5 A. & E. 703, 720, 731.

merely sign his name (*a*). Or the knowledge may have been acquired by the witness having seen letters or other documents which purported to be the handwriting of the person in question and having afterwards communicated personally with that person upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the person in some matter to which they relate, or by the witness transacting with such person some business to which they relate, or by any other mode of communication between the witness and such person, which would in the ordinary course of the transactions of life induce a reasonable presumption that the letters or documents were the handwriting of such person (*b*). And of course evidence of the identity of the writer must be added *aliunde*, if the witness be not personally acquainted with him (*c*).

A third mode of proof has been sanctioned by statute (*d*). It is enacted with regard both to civil and criminal cases, in the same terms, that—

Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same, may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute (*e*).

The writing which is to be thus used as a standard may be proved, besides other ways, by the admission of the writer himself while under examination (*f*); or it may be written by him while he is in the witness-box undergoing examination (*g*).

(*a*) *Garrells v. Alexander* (1801) 4 Esp. 37; *Powell v. Ford* (1817) 2 St. 164; *Lewis v. Sapio* (1827) M. & M. 39.

(*b*) B. N. P. 236; *Carey v. Pitt* (1797) Pea. Add. Ca. 130; *Harrington v. Fry* (1824) R. & M. 90; *Tharpe v. Gisburne* (1825) 2 C. & P. 21.

(*c*) *Doe v. Suekermore* (1836) 5 A. & E. 703, 731.

(*d*) 17 & 18 Vict. c. 125 s. 27 (civ.); 28 & 29 Vict. c. 18 s. 8 (crim.)

(*e*) And the convenient practice is to submit the writings to the inspection of the jury as soon as the comparison has been made by the witness. *Cresswell v. Jackson* (1860) 2 F. & F. 24.

(*f*) *Ibid.*

(*g*) *Cobbett v. Kilminster* (1865) 4 F. & F. 490.

As to the date of the writing or signature, if the document itself bears a date, it is presumed till the contrary is proved that that is the date at which it was written or signed; and this presumption is made not only against the person himself who wrote or signed it (*h*), but also against other persons (*i*).

With regard to erasures and interlineations it is generally presumed, if the document be a deed, that they were made before the execution of the instrument; if a will, that they were made afterwards (*k*). In the case of a will, if the time of the alteration becomes a question of evidence, a special exception to the rule against hearsay permits any declarations of the testator bearing on the point to be proved (*l*); and such declarations are equally admissible with regard to the validity of the will (*m*).

The proof of handwriting always involves of course the identification of the writer. But it sometimes happens that the handwriting or signature of a document cannot be identified in any of these ways as that of the person who is alleged to have written or signed it, but only as that of some person of the same name, so that some further evidence is necessary to establish personal identity. The mere identity of the names of the person proved to have written or signed the document and of the person sought to be charged with it will frequently be *prima facie* evidence of their identity, unless the name happens to be a very common one (*n*). If

(*h*) *Hunt v. Massey* (1834) 5 B. & Ad. 902.

(*i*) *Anderson v. Weston* (1840) 6 Bing. N. C. 296, 301 *seq.*; *Potez v. Glossop* (1848) 2 Ex. 191; *Malpas v. Clements* (1850) 19 L. J. Q. B. 435.

(*k*) *Doe v. Cutmore* (1851) 16 Q. B. 745; see Theobald on Wills, 2nd ed., 1881, p. 32.

(*l*) *In the Goods of Sykes* (1873) L. R. 3 P. & D. 26; *Dench v. Dench* (1877) 2 P. D. 60; and see above, p. 256, below, p. 286.

(*m*) *Doe v. Allen* (1799) 8 T. R. 147; *Ellis v. Hardy* (1836) 1 M. & R. 525; and see above, p. 256.

(*n*) *Jones v. Jones* (1841) 9 M. & W. 75; *Scwell v. Evans* (1843) 4 Q. B. 626; *Hamber v. Roberts* (1849) 7 C. B. 861.

however a doubt is fairly thrown on the correctness of this inference, some further evidence of identity is necessary. The nature of this will depend upon circumstances: thus evidence may be given of the presence of the person to whom the document is attributed at the time and place when it was executed, or of identity not only of name but also of address and occupation (*o*), or of name and address alone (*p*), or of some acknowledgment of the document by the person charged with it.

(b) *Sealing*.—Sealing is generally effected by affixing a waxen seal or a wafer upon the document, but it is also sufficient if the seal, stick or other instrument used be merely impressed on the plain parchment or paper with an intent to seal it (*q*). And either the seal may be affixed or impressed at the time by the party who signs the document, or he may acknowledge as his own a seal that has been previously affixed or impressed, as by touching it and declaring that the document is his act and deed (*r*), or by signing his name opposite to a seal on an instrument that bears a declaration that it has been sealed with his seal (*s*), or in any other manner which implies his adoption of the seal as his own.

Sealing is ordinarily proved in one of the following ways.

The party may call a witness who saw the seal actually affixed or impressed at the time of signature, or, if it was then already affixed or impressed, saw it acknowledged by the person who signed the document. The sealing may also be inferred from the fact that the person alleged to have sealed it is proved to have signed the instrument at a time when it

(*o*) *Harrington v. Fry* (1824) Ry. & Moo. 90.

(*p*) *Whitlocke v. Musgrove* (1833) 1 Cr. & M. 511, 522; *Greenshields v. Crawford* (1842) 9 M. & W. 314.

(*q*) *R. v. St. Paul, Covent Garden* (1845) 7 Q. B. 232; *Re Sandilands* (1871) L. R. 6 C. P. 411; *S. C. sub nom. Re Mayer*, 40 L. J. C. P. 201.

(*r*) *Williams' Real Property*, 14th ed., 1882, p. 154.

(*s*) *Talbot v. Hodson* (1816) 7 Taunt. 251.

contained a declaration that the seal opposite to the signature is his seal (*t*). And this inference may be drawn notwithstanding the absence of any apparent impression or seal (*u*). If the document still bears the seal, its due sealing may also be inferred from the mere proof of the signature standing against it (*x*).

The presumption as to the date of the sealing is similar to that as to signing (*y*).

(c) *Delivery*.—The term delivery is used in somewhat different senses. In regard to letters, notices and most other documents it is generally used in its ordinary meaning to signify the physical transmission of the document from the sender to the recipient. But in regard to deeds, and perhaps some other documents by which property or rights are granted, it denotes not merely that actual delivery of the document by the grantor to the grantee which is the most emphatic symbol of the grantor's intention that the deed shall forthwith have the effect which it purports to have, but also any other act done by the grantor, either with or without the presence and consent of the grantee, which indicates the same intention on his part. In such cases the delivery is only constructive. Thus if the grantor at the time of executing the deed says to any other person, "I deliver this as my act and deed," or says or does anything from which it may be inferred that he has executed the deed with the intention that it shall operate immediately, even though it is not delivered to the grantee or anyone on his behalf, but is retained in the custody of the grantor, the delivery will be deemed complete.

Delivery is ordinarily proved in one of the following ways.

The best way is to call some witness who can prove either

(*t*) *Talbot v. Hodson* (1816) 7 Taunt. 251.

(*u*) *Re Sandilands* (1871) L. R. 6 C. P. 411.

(*x*) *Grellier v. Neale* (1792) Pea. 147; cp. *Fassett v. Brown*, *Ibid.* 23.

(*y*) *Anderson v. Weston* (1840) 6 Bing. N. C. 286, 301; and see above, p. 259.

that he delivered it himself or that he saw it delivered by the person who did. In the case of a letter or other document delivered by hand the messenger may be called to prove its delivery at the time, in the mode, and to the person alleged. Or if he cannot be called, his delivery of it may be proved in some other way, as by some witness who saw him deliver the document in question, or, in the case of the messenger's death, by some admissible entry made by him in his books (*z*).

If the letter was sent by post, the person who posted it should be called to prove that fact. But it is not enough for the sender's clerk to say that the letter was sent by post on a particular day, if he has no recollection whether it was put in the post by himself or another clerk (*a*). Nor for the sender to prove that it was the regular usage of his office that letters for the post were always deposited on a particular table from which they were carried by a porter in his employ to the post-office and that in the particular case the letter was so put down on the table, unless he also calls evidence to prove that in this instance the porter took the letters from the table to the post; for the court will not presume that the course of business in a private office has the regularity of a public department (*b*). But if the porter is called, the mere fact that he has no recollection of the particular letter in question will not exclude his evidence, if he can swear that he invariably carried to the post-office all the letters found upon the table on which the particular letter is proved to have been placed (*c*). Where a solicitor's clerk stated that in the general course of business at his master's office he made up all letters to the agency clients, of whom the defendant was one, and placed

(*z*) See especially Chapters III and IV of Part III. pp. 125—138.

(*a*) *Hawkes v. Salter* (1828) 4 Bing. 715.

(*b*) *Hetherington v. Kemp* (1815) 4 Camp. 193.

(*c*) *Ibid.*

them in a box in the room where he sat, and that the postman invariably called for them and took the letters from the box, and that the letter in question was thus made up by himself in the usual course of his duty as a clerk, it was held that there was evidence that the letter had been delivered to the postman and that the delivery to him was equivalent to the delivery to the post-office (*d*). If the letter was posted by a clerk who has since died, the posting may be proved by some admissible entry made by him in his books, as an entry made in the course of his duty (*e*).

When a letter has once been proved in one of these ways to have been duly posted, it will be presumed, till the contrary is shown, that it was duly delivered in accordance with the ordinary course of business in the post-office. Where the date of the posting of a letter cannot be accurately proved, the time of its delivery may be *prima facie* inferred from the post-mark of the envelope in which it is proved to have been contained, as a post-mark is generally *prima facie* evidence not only of the existence of the letter at the date signified by the mark (*f*), but also of its delivery according to the ordinary course of business of the post-office to the person to whom it was addressed (*g*). But in one case it was held that some evidence was requisite that the post-mark was genuine (*h*); and in any case where doubt is thrown upon it, it seems that some evidence should be given by some person who is acquainted with it (*i*).

The date of a deed is presumed *prima facie* as against both parties and third persons to be the date of its delivery (*k*).

(*d*) *Skilbeck v. Garbett* (1845) 7 Q. B. 846.

(*e*) *Hagedorn v. Reid* (1813) 3 Camp. 377; and see Chapters III and IV of Part III. pp. 125—138; also p. 255.

(*f*) *Fletcher v. Braddyll* (1821) 3 St. 64.

(*g*) *Archangelo v. Thompson* (1811) 2 Camp. 620; cp. *Kent v. Lowen* (1808) 1 Camp. 177.

(*h*) *R. v. Watson* (1808) 1 Camp. 215; cp. *Fletcher v. Braddyll* (1821) 3 St. 64.

(*i*) *Abbey v. Lill* (1829) 5 Bing. 299.

(*k*) *Anderson v. Weston* (1840) 6 Bing. N. C. 293, 300, 301.

(ii) *Proof by or through Attesting Witnesses.*

Attestation means the signature of a document by some person who is not himself one of the parties to it (*l*), but has beheld its execution by one or more of the parties and signs his own name thereto as a record of that fact, being constituted an official witness, as it were, of such execution (*m*). When a document is attested, it is a common practice to subjoin to the instrument an attestation clause stating that the signing, sealing and delivery, as the case may be, has been effected in the presence of the persons whose names are thereunder subscribed as attesting witnesses.

In some cases attestation is made by statute a necessary condition to the valid execution of the document, as in the case of wills, bills of sale, and certain other documents. In other cases, as in that of ordinary deeds, it is a common practice to attest the execution in order to facilitate its proof at any future time. Before 1851, when parties to the record were first rendered competent as witnesses (*n*), it was usual for every document of importance to be attested, whether the law required it or not, in order to secure a witness who would be competent to prove the document. And at the same time it was a settled rule that no document which was attested, whether voluntarily or compulsorily, could be proved otherwise than by calling the attesting witness or by proof in certain cases of his handwriting, (unless the attestation was voluntary and this special mode of proof was waived), inasmuch as he was considered to have been pre-appointed by the parties for the express purpose of proving the execution of the document. But by the Common Law Procedure Act, 1854, it was provided in regard to civil cases that—

(*l*) *Scale v. Claridge* (1881) 7 Q. B. D. 516.

(*m*) *R. v. Harringworth* (1815) 4 M. & S. 350, 354; *Bowman v. Bowman* (1843) 2 M. & R. 501.

(*n*) See p. 85.

It shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved by admission or otherwise, as if there had been no attesting witness thereto (*o*).

And a like provision was subsequently made in regard to criminal cases (*p*). The practice, which till then had been obligatory, of proving attested documents by means of the attesting witness, was not thereby prohibited, but only rendered optional in all cases where attestation was not necessary to validity (*q*). Hence the law now stands thus: where by any statute attestation is requisite to the validity of a document, its execution must still (unless special provision is made to the contrary) be proved, in accordance with the old common law rule, by or through the attesting witnesses. Where, on the other hand, the attestation is merely voluntary, the party adducing the document in evidence has the option of proving it either by means of the attesting witnesses, or by ordinary witnesses as described in the last sub-section of this chapter, or by notice to admit, in cases where that process is applicable.

The proof of a document by means of attesting witnesses is governed by the same rules whether the attestation was compulsory or not, and is as follows.

Although two or more attesting witnesses may be necessary to the valid execution of a document, it is in law sufficient to call one alone, provided that he can testify to the observance of all the requisite formalities (*r*). The witness should be able to prove that he saw the document duly executed by the party by whom it purports to have been executed; and for this purpose he may refresh his memory by inspecting his

(*o*) 17 & 18 Vict. c. 125, s. 26.

(*p*) 28 & 29 Vict. c. 18, s. 7, is in the same terms omitting only the words "by admission or otherwise."

(*q*) *In re Mair's Estate* (1873) 42 L. J. Ch. 882.

(*r*) *Wright v. Doe* (1834) 1 A. & E. 3, 23; *Forster v. Forster* (1864) 33 L. J. P. M. & D. 113.

signature (*s*). Where an attesting witness is proved to be dead (*t*), or out of the jurisdiction of the court (*u*), or insane (*x*), or is missing and cannot after honest and diligent inquiry be found (*y*), or is incompetent to testify in the particular proceedings by reason of interest (*z*), it will be sufficient to prove his handwriting. But this must be taken subject to this qualification, that such evidence of his handwriting can only be given where no other attesting witness can be produced (*a*). The handwriting of the witness being thus proved, the attestation clause becomes evidence of everything that is stated in it, as that the document was duly signed, sealed, and delivered in the presence of the attesting witnesses by the party who purports to have so signed, sealed and delivered it (*b*). But if an attesting witness when called, or the attestation clause (in case of his death), does not identify the person who executed the document with the particular person of the same name who is alleged by the party tendering the document to have executed it, some evidence of identity must of course be given (*c*).

If the genuineness of an attested document is impeached on the ground of forgery or fraud, and it is alleged that deceased attesting witnesses were accomplices therein, evidence is admissible of their good character (*d*).

(*s*) *Maugham v. Hubbard* (1828) 8 B. & C. 14, 16; *Whitlock v. Musgrove* (1833) 1 C. & M. 511, 519. See p. 255.

(*t*) *Barnes v. Trompowsky* (1797) 7 T. R. 265, 266; *Adam v. Kerr* (1798) 1 B. & P. 360; *Prince v. Blackburn* (1802) 2 East, 250.

(*u*) *Barnes v. Trompowsky* and *Prince v. Blackburn*, *supra*; *Glubb v. Edwards* (1840) 2 Moo. & Rob. 300; *In re Mair's Estate* (1873) 42 L. J. Ch. 882.

(*x*) *Carrie v. Child* (1812) 3 Camp. 283.

(*y*) *Crosby v. Percy* (1808) 1 Taunt. 364; *Burt v. Walker* (1821) 4 B. & A. 697.

(*z*) *Cunliffe v. Sefton* (1801) 2 East, 183.

(*a*) Phill. Ev. 10th ed., 1852, vol. 1, p. 432. For a special exception to this rule, see *Wright v. Doe* (1834) 1 A. & E. 3.

(*b*) *Milward v. Temple* (1808) 1 Camp. 375; *Whitlocke v. Musgrove* (1833) 1 C. & M. 511, 518, 519.

(*c*) *Whitlocke v. Musgrove*, *supra*.

(*d*) *Doe v. Stephenson* (1801) 3 Esp. 284; *Doe v. Walker*, 4 *ibid.* 50; *Durham v. Beaumont* (1808) 1 Camp. 207, 210; *Provis v. Reed* (1829) 5 Bing. N. S. 435. Cp. pp. 255, 256, above.

(iii) *Proof by Notice to Admit.*

This mode of proof is not applicable to criminal proceedings. Nor does it extend even in civil proceedings to the proof of documents which by law require attestation, for reasons which have just been stated; and hence neither the prescribed form nor the rules contain any reference to attestation. Rule 2 of Order XXXII provides that—

Either party may call upon the other party to admit any document, saving all just exceptions; and in case of refusal or neglect to admit, after such notice, the costs of proving any such document shall be paid by the party so neglecting or refusing, whatever the result of the cause or matter may be, unless at the trial or hearing the court or a judge shall certify that the refusal to admit was reasonable; and no costs of proving any document shall be allowed unless such notice be given, except where the omission to give the notice is, in the opinion of the taxing officer, a saving of expense.

The reservation “saving all just exceptions” imports that the admission which is asked is required only in order to dispense with the proof necessary for the adduction of the document in evidence, if otherwise admissible. The party giving the admission will remain entitled to object that it is not relevant, or that it is not an admissible medium of proof of the fact which is sought to be proved by it. This is further made clear by the prescribed form of the notice to admit which is set out in Appendix B (*c*).

The Order does not define in what cases a refusal to admit would be reasonable, but in the case of documents of which the opponent is not likely to have had any previous cognizance, it must obviously be in most cases of little use to endeavour to extract the admission, not to mention the disadvantage which may sometimes accrue from making a voluntary discovery. Thus in an action by a lord of a manor to recover a piece of the waste of the manor which has been trespassed upon and occupied by a squatter, there is generally nothing

(*c*) See p. 314.

to be gained by the plaintiff submitting his title deeds to the defendant's inspection and asking for an admission of them.

Subject to this qualification, the notice to admit is intended, as an examination of the form of it will show (*f*), to secure admissions with regard both to original documents in the possession of the party serving the notice, and to original documents not in his possession but of which he has copies. (The admissions asked as to the copies themselves will be referred to in the chapter on secondary evidence.) With regard to originals in the party's possession the notice requires an admission that they were written, signed or executed as they purport respectively to have been. Such an admission covers the whole proof of a document for which attestation is not requisite, as the term execution denotes sealing and delivery (*g*). With regard to original documents of which the party has only got copies, the notice requires an admission that the originals were served, sent or delivered respectively as stated in the notice. It appears to be assumed with regard to any private document which is likely to be comprised in this part of the notice either that such admission will cover the writing, signing and sealing of it, as the case may be, by reason of the terms in which the document is described, or that the party serving the notice will be able to prove these particular facts and will only require an admission as to the serving, sending or delivering of it.

§ 3.—Proof of Document when Ancient.

The production in court of ancient private documents is governed by the rules stated in the first section of this chapter; but their proof, when so produced, is facilitated by certain special rules, the subject of this section. And as the date of a document is presumed *prima facie* to be correct, a

(*f*) See p. 314.

(*g*) Williams' Real Property, 14th ed., 1882, p. 154.

document which appears from its date to be thirty years old or more, is deemed an ancient document unless the contrary is proved (*h*).

The general rule is this, that an ancient document proves itself (*i*), or in other words it is presumed that it was written, signed, sealed, delivered, attested, and stamped, as the case may be, by the persons in the mode and at the time and place that it purports to have been, provided always that it is produced from proper custody, and that the appearance of it when inspected is not inconsistent with its authenticity (*k*). But inasmuch as the proof of a document always involves the identification of the parties to it (*l*), the rule must be understood subject to this, that if an ancient document does not itself state or otherwise identify the names or characters of the parties to it, some sort of evidence will be necessary before it will be admissible. If for instance in order to prove the receipt of tolls, books are tendered in evidence alleged to be books of deceased receivers of the tolls, it will be necessary, if the books themselves do not show it, to give some evidence that they were kept by such receivers as alleged (*m*). On these conditions being fulfilled an ancient document becomes admissible in evidence, although its whole effect may be afterwards displaced by other evidence adduced to show that it was cancelled after execution, or that it never was in fact duly executed, or even that it was a forgery.

The ground of the rule is the great difficulty, indeed in many cases the impossibility, of proving the execution and attestation of documents in the ordinary way after the

(*h*) *Anderson v. Weston* (1840) 6 Bing. N. C. 296, 301.

(*i*) As to this expression see *Doe v. Burdett* (1835) 4 A. & E. 1, 19; another form in which the rule is stated is to say that execution is presumed or need not be proved. But the statement in the text appears to be the more correct, inasmuch as the presumption extends to other particulars besides execution, strictly so called, as, for instance, attestation and stamping.

(*k*) *Meath v. Winchester* (1836) 3 Bing. N. C. 182, 200.

(*l*) See pp. 259, 260.

(*m*) *Doe v. Thynne* (1808) 10 East, 206. See above, p. 255.

lapse of many years (*n*). Hence in the case of a will the period of thirty years is reckoned not from the testator's death, but from the date of execution of the instrument (*o*). And the fact that the evidence thus dispensed with could in fact be adduced, as where for instance the attesting witnesses are still living, does not preclude the operation of the rule (*p*). The rule is of general application (*q*), and the cases illustrate it in connection with many different kinds of documents, including settlements (*r*), wills (*s*), bonds (*t*), leases (*u*), agreements (*x*), case stated for counsel's opinion (*y*), stewards' books containing entries of the receipt of rents (*z*), and letters (*a*).

(i) *Custody*.—This condition of admissibility must be proved by some evidence (*b*). Proper custody does not necessarily mean the most appropriate custody, the custody of the person entitled in law to hold the document, but either that or any other custody which in the circumstances of the case appear to the court to be consistent with its genuineness (*c*).

The cases present among others the following examples of documents held admissible as coming from proper custody, namely, a deed creating a long term produced by one who

(*n*) *Wynne v. Tyrwhitt* (1821) 4 B. & A. 376; *Andrews v. Motley* (1862) 32 L. J. C. P. 128, 131.

(*o*) *Doe v. Wolley* (1828) 8 B. & C. 22.

(*p*) *Doe v. Burdett* (1835) 4 A. & E. 1, 19.

(*q*) *Wynne v. Tyrwhitt* (1821) 4 B. & A. 376.

(*r*) *Doe v. Samples* (1838) 8 A. & E. 151.

(*s*) *Doe v. Wolley* (1828) 8 B. & C. 22; *Doe v. Burdett* (1835) 4 A. & E. 1; *Andrews v. Motley* (1862) 32 L. J. C. P. 128.

(*t*) *Chelsea Waterworks v. Cowper* (1795) 1 Esp. 275.

(*u*) *Plaxton v. Dave* (1829) 10 B. & C. 17.

(*x*) *Mytton v. Thornbury* (1860) 29 L. J. M. C. 109.

(*y*) *Meath v. Winchester* (1836) 3 Bing. N. C. 183.

(*z*) *Wynne v. Tyrwhitt* (1821) 4 B. & A. 376.

(*a*) *Doe v. Beynon* (1840), 12 A. & E. 431.

(*b*) *Earl v. Lewis* (1801) 4 Esp. 1; *Evans v. Rees* (1839) 10 A. & E. 151.

(*c*) *Doe v. Phillips* (1845) 8 Q. B. 158; *Doe v. Keeling* (1848) 11 Q. B. 884.

was solicitor both to the administrator of the testator and to certain of the persons beneficially interested under it (*d*) ; an expired lease produced from custody of the agent of a successor in title of the lessor (*e*) ; a will produced by tenant for life claiming title under it (*f*) ; a settlement produced by equitable tenant for life claiming under it (*g*) ; case with counsel's opinion thereon, stated and given on behalf of Bishop of M. as to right to an advowson, produced from custody of the bishop's descendants who were not successors in title to the advowson (*h*) ; and an agreement between certain inhabitants of a parish and the owner of an estate within it for the separate maintenance by the latter of the poor upon his estate, produced from the custody of a large landowner in the parish, though not a successor in title or descendant of any of the parties to the agreement (*i*).

(ii) *Apparent Regularity*.—If there is anything on the face of the document inconsistent with its authenticity it will be inadmissible, unless evidence can be adduced to explain the matter and remove the doubt. But there are few good examples in the books of the discussion of this condition of admissibility, and it is obvious that its application must vary in every instance. In a case where a deed about thirty-six years old purported to have been sealed and delivered “being first duly stamped,” and there were marks as of a stamp having been once impressed and afterwards obliterated, the court held that, although no evidence had been given to account for the state of the document, the judge at the trial had been justified in holding it to have been duly stamped and admitting it in evidence (*k*).

(*d*) *Doe v. Phillips* (1845) 8 Q. B. 158.

(*e*) *Doe v. Keeling* (1848) 11 Q. B. 884.

(*f*) *Andrews v. Motley* (1862) 32 L. J. C. P. 128.

(*g*) *Doe v. Samples* (1838) 8 A. & E. 151.

(*h*) *Bishop of Meath v. Mayor of Winchester* (1836) 3 Bing. N. C. 183.

(*i*) *Mytton v. Thornbury* (1860) 29 L. J. M. C. 109.

(*k*) *Doe v. Coombs* (1842) 3 Q. B. 686.

CHAPTER V.

STAMPS.

THE last chapter stated what was necessary to the proof of an original private document when produced in court. But many documents are also required, in the interests of the revenue, to be stamped at the time of execution, and in default thereof are either wholly inadmissible or only admissible on the payment of penalties.

Thus a receipt given for or upon the payment of money amounting to 2*l.* or upwards must be stamped with a penny stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands. So every agreement or memorandum of agreement under hand only, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument, must be stamped with a sixpenny stamp, which is to be cancelled by the person by whom the agreement is first executed, except the following agreements which are exempt, namely, any agreement or memorandum (a) the matter whereof is not of the value of 5*l.*, (b) for the hire of any labourer, artificer, manufacturer or menial servant, (c) for or relating to the sale of any goods, wares or merchandise, (d) between the master and mariners of any ship or vessel for wages on any voyage coast-wise from port to port in the United Kingdom.

The stamping of documents is now regulated by the Stamp Act, 1891, 54 & 55 Vict. c. 39, which repeals most of the previous enactments (*a*), and contains in its first schedule a

(*a*) Sect. 123. But the Act is not retrospective; see sects. 1 and 14 (4); *Clarke v. Roche* (1877) 3 Q. B. D. 170.

list of the documents which require to be stamped and the amounts of the respective stamps. With regard to some documents the act provides that if they have not been stamped originally in accordance with its provisions, they cannot afterwards be stamped on any terms so as to render them admissible in evidence; such are bills of exchange and promissory notes (*b*), bills of lading (*c*), proxies and voting papers (*d*), and some others. There are several others which can only be stamped after execution within certain fixed periods of time, in some cases only on payment of a penalty, and in others without such payment. With regard to all other documents sect. 15 (1) contains a general provision as to the terms on which they may be stamped after execution. But the effect of all the provisions of the Act, whether general or special, with regard to documents that may be stamped after execution on the payment of penalties has been qualified by certain standing regulations made by the commissioners by virtue of the power to remit penalties conferred on them by sect. 15 (3). These regulations provide that agreements under hand only, liable to the fixed duty of sixpence, may be stamped without penalty within fourteen days from the date of execution, and a large number of other instruments within thirty days (*e*).

With regard to the production in evidence of documents which require to be stamped, sect. 14 of the Act provides as follows:—

(1) Upon the production of an instrument chargeable with any duty as evidence in any court of civil judicature in any part of the United Kingdom, or before any arbitrator or referee notice shall be taken by the judge, arbitrator, or referee of any omission or insufficiency of the

(*b*) Sects. 34—38. “Bill of exchange” includes “draft, order, cheque, letter of credit,” and certain other documents: see s. 32. For definition of “promissory note,” see sect. 33.

(*c*) Sect. 40.

(*d*) Sect. 80.

(*e*) See Alpe's Stamp Duties, 2nd ed., 1891, p. 38.

stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the court whose duty it is to read the instrument or to the arbitrator or referee of the amount of the unpaid duty, and the penalty payable on stamping the same, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds.

(4) Save as aforesaid an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done in any part of the United Kingdom shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

The duty imposed by this section upon the judge, arbitrator, or referee before whom the case is being heard, to take notice of any omission or insufficiency of the stamp on any document tendered in evidence, is imperative. The fact that the opponent of the party tendering it raises no objection (as is now the usual practice where the objection is not fatal to the action, but may be cured on the payment of a penalty), or that he has even agreed that the document shall be given in evidence without any such objection, does not exonerate the tribunal from the duty of taking notice of it (*f*).

Before this act the courts in construing the enactments in force from time to time as to the exclusion from evidence of unstamped documents had laid down the principle that the prohibition did not apply where the document was tendered for a collateral purpose, that is, for some purpose other than the primary and direct purpose denoted or implied by the title or description of the document contained in the act. This principle was before 1854 applied indifferently in criminal and civil cases, but by the Stamp Act of that year (*g*), the numerous distinctions which had arisen in its application to criminal cases were put an end to by the

(*f*) *Nixon v. Albion Marine Insurance Co.* (1867) L. R. 2 Ex. 338; *Bowker v. Williamson* (1889) 5 T. L. R. 382.

(*g*) 17 & 18 Vict. c. 83, s. 27.

general provision that every instrument liable to stamp duty should be admitted in evidence in any criminal proceedings, although it might not have the stamp required by the law impressed thereon or affixed thereto. The same provision though in different terms appeared in the subsequent act of 1870 (*h*), and now appears, as set forth above, in that of 1891. In criminal cases therefore an unstamped document is admissible for every purpose.

With regard to civil cases the acts of 1854 and 1870 made no change in the rule by which an unstamped document was only admissible in evidence, if the purpose for which it was tendered was collateral. The most obvious examples of collateral purpose are cases where the document is only produced for the purpose of comparison of handwriting, or merely as a link in a chain of circumstantial evidence to prove that a party to the document was at a particular place on a particular date, or where the party tendering the document alleges that it was never intended to be a valid instrument and seeks to prove it merely as a step in the commission of a fraud (*i*). Before the act of 1891 the prohibition against the adduction of unstamped documents in other than criminal proceedings was in these terms, that no such instrument should "except in criminal proceedings, be pleaded or given in evidence or admitted to be good, useful, or available in law or equity" (*k*). But the act of 1891 provides that no such instrument shall "except in criminal proceedings, be given in evidence or be available for any purpose whatsoever" (*l*). This change in language seems to indicate an intention to prohibit the admissibility of unstamped documents even for collateral purposes, and appears to be moulded on the language used in sect. 54 (1) of the act of

(*h*) 33 & 34 Vict. c. 97, s. 17.

(*i*) *Gregory v. Fraser* (1814) 3 Camp. 454; *Keable v. Payne* (1838) 8 A. & E. 555; *R. v. Gompertz* (1846) 9 Q. B. 824.

(*k*) See 33 & 34 Vict. c. 97, s. 17, and prior Acts.

(*l*) Sect. 14 (4).

1870 as to bills and notes, which has been held to exclude the adduction of those documents even for collateral purposes (*m*). It would seem however that if the party tendering the document is not the party responsible for the want of the stamp, and does not approbate it as a valid instrument, but only presents it to the court as a fraud or forgery, it would still be admissible, though unstamped.

Stamp duty is always chargeable on an instrument in accordance with its real character and effect in law, and it is immaterial by what other title the parties may choose to designate it; the substance and not the form of the instrument will be regarded (*n*). But if the instrument is duly stamped with reference to its principal object, this stamp covers everything accessory to this object (*o*). The following examples illustrate what is meant by accessory matters, not requiring any stamp in addition to that required for the principal object of the instrument: a lease with an option of purchase of the property demised need only be stamped as a lease and not as an agreement also, the option to purchase being merely ancillary to the main purpose of the document (*p*); and a lease in which a third party joined for the purpose of guaranteeing the payment of the rent was held to be stampable as a lease only and not as a deed also, the covenant of the surety being purely accessory to the lease which was the main purpose of the deed (*q*).

But where a document contains more than one distinct principal matter, a different rule applies. Sect. 4 (a) of the Act provides that "an instrument containing or relating to several distinct matters is to be separately and distinctly

(*m*) See as to this section *Ashling v. Boon* [1891] 1 Ch. 568.

(*n*) *Hutton v. Lippert* (1883) 8 App. Ca. 309; and see case in next note.

(*o*) *Limmer Asphalt Paving Co., Ltd. v. Commissioners of Inland Revenue* (1872) L. R. 7 Ex. 211.

(*p*) *Worthington v. Warrington* (1848) 5 C. B. 636.

(*q*) *Price v. Thomas* (1831) 2 B. & Ad. 218; *S. C.* sub nom. *Pratt v. Thomas* 4 C. & P. 554.

charged, as if it were a separate instrument, with duty in respect of each of the matters." A lease containing an option to purchase property other than that demised (*r*), and a lease of several estates to several tenants at different rents (*s*), are examples of distinct matters within the meaning of this section. In cases of this kind, where the matters are distinct, but the instrument is in law one, the general rule is that, unless it is sufficiently stamped to cover both matters, it cannot be given in evidence in respect of either. But the rule is otherwise where, though the document is physically one, it contains really two independent instruments, as, for example, a statement of account between two parties at the foot of which is a receipt for money paid (*t*). Here the one part of the document can be given in evidence notwithstanding that the other is inadmissible for want of a stamp.

If a document tendered in evidence bears the proper stamp, the court will presume, in the absence of evidence to the contrary, that it was affixed or impressed at the proper time, and it lies on the objector to prove the contrary (*u*). If the document bears no stamp, but is alleged to have once been duly stamped, it becomes a question of evidence whether it has been duly stamped or not (*x*). Thus, where a deed about thirty-six years old purported to have been sealed and delivered "being first duly stamped," and there were marks as of a stamp having been once impressed though afterwards obliterated, the court held that, although no evidence was given to account for the state of the document, the judge at the trial had been justified in holding it to have been duly stamped and admitting it in evidence (*y*).

(*r*) *Lovelock v. Franklin* (1846) 8 Q. B. 371.

(*s*) *Doe v. Day* (1811) 13 East, 241. For other examples see *Alpe's Stamp Acts*, ed. 1891, pp. 3, 16, and 18.

(*t*) *Matheson v. Ross* (1849) 2 H. L. C. 286.

(*u*) *Bradlaugh v. De Rin* (1868) L. R. 3 C. P. 286.

(*x*) *Marine Investment Co. v. Harviside* (1872) L. R. 5 H. L. 624.

(*y*) *Doe v. Coombs* (1842) 3 Q. B. 687.

CHAPTER VI.

SECONDARY EVIDENCE OF PRIVATE DOCUMENTS.

§ 1. <i>Events in which Secondary Evidence is admissible :</i>	§ 1. (iv) <i>Lawful Non-production by Third Person.</i>
(i) <i>Loss or Destruction of Original.</i>	(v) <i>Non-compliance with Notice to Produce.</i>
(ii) <i>Irremovability of Original.</i>	§ 2. <i>Species of Secondary Evidence.</i>
(iii) <i>Original out of Jurisdiction.</i>	§ 3. <i>Presumptions as to the Original.</i>

A PARTY who desires to put a document in evidence is bound, as stated in the last chapter but one, whenever it is possible, to produce, or procure the production of, the original in court. Should this be impossible, the law permits him in most cases to give other evidence, called secondary evidence, of its contents, provided always that the original if produced would itself have been admissible. This is allowed on the principle that when a party has taken all reasonable means, without success, to procure the production of the original, it is right that he should be permitted to resort to other evidence (*a*).

For the purpose of this rule the distinction must be borne in mind between instruments executed in duplicate, where the document retained by each party is executed by them both, and instruments executed in counterparts, where the document retained by each party is executed by the other party only. Where an instrument is executed in duplicate or triplicate, all the parts are originals, and the non-production of all of them must be accounted for before secondary

(*a*) *Doe v. Ross* (1846) 7 M. & W. 102; *Boyle v. Wiseman* (1855) 10 Ex. 647, 649.

evidence can be given of the contents (*b*). In the case of instruments executed in counterparts, each part is an original with reference to any question of the estate granted or the liability undertaken, as the case may be, by the party who executed that particular part, and is secondary evidence only of any grant or obligation by the party who has not signed it. But by a convenient exception, allowed at any rate in the case of deeds, a party may tender in evidence the part signed by his opponent in order to prove the contents of the other part of the document. A sued his lessee for possession of the premises, forfeited for breach of covenant, but omitted to give the defendant notice to produce the original lease to prove his right of re-entry; it was ruled that he was entitled to put in his own counterpart for this purpose, on the ground that the defendant thereby under his seal recited that he was bound by the proviso for re-entry (*c*).

§ 1.—Events in which Secondary Evidence is admissible.

(i) *Loss or Destruction of Original*.—Secondary evidence is admissible whenever the original is lost or destroyed, and it is immaterial for this purpose by whose agency it has happened (*d*). If no one can be called who witnessed its actual destruction, it is necessary to give evidence from which the judge may reasonably presume its loss or destruction. There is a great difference in this respect between valuable and valueless documents. It is a fair presumption that a man will keep all documents which may with any degree of probability be of present or future value to him, and that he

(*b*) *Alivon v. Furnival* (1834) 1 C. M. & R. 277, at p. 292.

(*c*) *Roe v. Davis* (1806) 7 East, 363; cp. *Burleigh v. Stibbs* (1793) 5 T. R. 465, a like decision as to a deed of apprenticeship. These cases were approved of in *Paul v. Meek* (1828) 2 Y. & J. 116.

(*d*) *Kensington v. Inglis* (1807) 8 East, 273, 277—280; *Doc v. Ross* (1840) 7 M. & W. 102, 122; *Rainy v. Bravo* (1872) L. R. 4 P. C. 287; cp. *R. v. Castleton* (1799) 6 T. R. 236; *Munn v. Godbold* (1825) 3 Bing. 292.

will on the other hand throw away or destroy those which have served their end and are never likely to be required for any purpose whatever. In the former case it is reasonable to exact proof of very careful search, whereas in the latter very slight evidence tending to show loss or destruction will suffice (*e*). What is a proper search and inquiry must always depend on the particular circumstances of the case. Whenever a document might not improperly be kept in the custody of any one of several persons, the search should be extended accordingly. On this preliminary question of search the judge may in his discretion admit evidence of the statements of persons not called, which would be excluded if tendered as evidence of the facts in issue (*f*).

(ii) *Irremovability of the Original*.—Secondary evidence is also admissible where the original is not practically removable, as in the case of writings or placards upon walls, boardings or notice-boards, and inscriptions on monuments and tombstones (*g*).

(iii) *Original out of the Jurisdiction*.—Also where the original is in the custody of a person out of the jurisdiction, who is not permitted by the law or usage of the place where he is to allow its removal. A charter-party made and signed by the parties in a notary's book in Java in accordance with the law of that island, and by that law not removable, was held to be provable by secondary evidence (*h*). A copy of an agreement of reference made in France according to

(*e*) *Brewster v. Sewell* (1820) 3 B. & A. 296.

(*f*) *R. v. Kenilworth* (1845) 7 Q. B. 642; *R. v. Braintree* (1858) 28 L. J. M. C. 1.

(*g*) *Mortimer v. McCallan* (1840) 6 M. & W. 58, 68; *Bruce v. Nicolopulo* (1855) 11 Ex. 129, 133; *ep. Bartholomew v. Stephens* (1839) 8 C. & P. 728, and examples there referred to, and contrast with *Jones v. Tarleton* (1842) 9 M. & W. 675.

(*h*) *Brown v. Thorton* (1837) 6 A. & E. 185. The copy tendered was not authenticated by any witness who had examined it with the original, but only by an official seal and signature, which the court could not recognize, and on that ground only was rejected.

French law, deposited with a French notary, and by the legal practice there not removable from that custody, was held provable here by an examined copy (*i*).

The above are examples of documents which by the law of the foreign place were public documents, though they would not have been so here. It has been questioned whether a private document in the lawful private custody of a person out of the jurisdiction may be proved in like manner (*k*). If it may, it is necessary to first prove that a formal demand has been made for the production of the document with a statement of the purpose for which the demand is made (*l*). It would seem that such evidence should be admissible upon the general principle stated at the beginning of this chapter (*m*).

(iv) *Lawful Non-production by a Third Person*.—Secondary evidence is admissible whenever the original is in the possession of a stranger to the proceeding who attends in court with the document and there lawfully refuses to produce it on some ground of privilege claimed by him either in his own right or as agent acting on the instructions of another. The usual and proper course of the party who seeks to give evidence of the document is to compel the attendance in court of the person who has possession of the document by means of a *subpoena duces tecum* (*n*); but if he should voluntarily attend with the document and should lawfully refuse to produce it, secondary evidence will be equally admissible (*o*). If on the other hand he attends, but without the document, and a *subpoena duces tecum* has not been served on him or not been duly served, this is a fatal objection to the admission of secondary evidence, as the party has not

(i) *Alivon v. Furnival* (1834) 1 C. M. & R. 277.

(k) *Boyle v. Wiseman* (1855) 10 Ex. 647.

(l) *Ibid.*; and *Crispin v. Dogliani* (1863) 32 L. J. P. M. & A. 109.

(m) See p. 278.

(n) See pp. 252, 253.

(o) *Doe v. Clifford* (1847) 2 C. & K. 448; *Dwyer v. Collins* (1852) 7 Ex. 639.

done all that lay in his power to procure the production of the original (*p*). If the person so refusing is merely agent for another by whose instructions the production is withheld, the fact that the principal does so refuse may be proved in several ways. He may himself attend the court upon a *subpoena* and then and there refuse (*q*), or may attend voluntarily and do the same (*r*); but it will be sufficient for the admission of secondary evidence if the agent himself can prove that he has had express instructions from his principal not to allow the production of the document (*s*). The grounds on which a person is justified in refusing to produce a document are stated under the title of Privilege in Part III, Chapter XV. The principal may of course waive his privilege (*t*), after which the agent's refusal to produce would no longer be lawful, unless based on some independent and just claim of privilege in himself (*u*). Neither principal nor agent thus claiming privilege is compellable to give oral or other secondary evidence of the contents of the privileged document, but if such evidence is voluntarily given it is admissible, even though it is given by an agent without the authority of his principal (*x*). Any other person who by oral or other secondary evidence can prove the contents of the privileged document may be called to do so (*y*), and to enable him to identify it for this purpose the person withholding production of it may be compelled to produce it for the purpose of identification, provided always that no part of the contents is disclosed. In the case of deeds and wills

(*p*) *Hibberd v. Knight* (1848) 2 Ex. 11.

(*q*) *Newton v. Chaplin* (1850) 10 C. B. 356.

(*r*) Cp. *Doe v. Clifford* (1847) 2 C. & K. 448.

(*s*) *Phelps v. Prew* (1854) 3 E. & B. 430.

(*t*) *Merle v. More* (1826) Ry. & M. 390.

(*u*) *Doe v. Ross* (1840) 7 M. & W. 102.

(*x*) *Marston v. Downes* (1834) 6 C. & P. 381; and (on motion to the court) 1 A. & E. 31; cp. *Hibberd v. Knight* (1848) 2 Ex. 11.

(*y*) *Mills v. Oddy* (1834) 6 C. & P. 728, 732.

identification can generally be effected by an inspection of the indorsement containing particulars of the instrument (z).

When production is unlawfully refused, no secondary evidence is admissible. The only remedies of the party whom such refusal affects are an application to postpone the trial (a) and proceedings upon the writ of subpoena (b).

(v) *Non-compliance with Notice to Produce.* — Lastly, secondary evidence is admissible whenever the original, being in the possession or under the control of the opposite party to the proceeding, is withheld after a notice has been duly served upon him or his solicitor in the suit to produce it at the trial. The term opposite parties does not ordinarily include co-defendants, but only parties between whom there is some question to be determined (c). Secondary evidence will not be admissible under this head unless the party serving the notice can prove that at the time of the service of the notice the original was in the possession or power of his opponent (d). In civil actions the process of discovery and inspection under Order XXXI affords a means of procuring this information (e). But when discovery has not been obtained, and in criminal cases where no such process is available, other evidence must be resorted to. In one case, where the plaintiff sought to give secondary evidence of a certificate of the defendant's bankruptcy, it being proved that the defendant had instructed his solicitors to obtain a certificate in circumstances in which he would be entitled to it, and some evidence having been given that a certificate had been

(z) *Phelps v. Prew* (1854) 3 E. & B. 430; *Doe v. Clifford* (1847) 2 C. & K. 448.

(a) See Order XXXVI r. 34, and Archbold's Crim. Pleading, 20th ed., 1886, p. 104.

(b) See p. 218.

(c) *Shaw v. Smith* (1886) 18 Q. B. D. 193; cp. *Eden v. Weardale Iron and Coal Co.* (1887) 35 Ch. D. 287.

(d) *Harvey v. Mitchell* (1841) 2 M. & R. 366.

(e) Pages 251, 252.

granted, the judge presumed that it had come to the defendant's possession (*f*). But the original need not be shown to be in the actual possession of the party, if it is in the custody of any other person who holds it for him and on his behalf without any adverse or independent claim (*g*). Thus a notice to produce has been held to bind the opposite party to produce the following documents, namely, cheques in the possession of his bankers (*h*), an order delivered by him to the captain of his vessel for delivery to a third person of goods on board of her (*i*), and, in an action of trover against a sheriff for illegal levy of the plaintiff's goods, the warrant of execution which had been returned to the hands of the undersheriff (*k*). But where the plaintiff called for a building contract between the defendant and another, which had been deposited with a third party to hold on behalf of the two contracting parties (*l*), and in another case, where the plaintiff sought to give in evidence the terms of a written authority under which defendant had acted but which was retained by his principal (*m*), it was ruled that notice to produce was insufficient; the holder of the document should have been served with a *subpoena duces tecum*.

The requisites of a notice to produce in reference to time of delivery and form have been already stated above (*n*).

In order to prove the service of the notice to produce, it is not necessary to serve a further notice to produce the original

(*f*) *Henry v. Leigh* (1813) 3 Camp. 499.

(*g*) *Evans v. Sweet* (1824) Ry. & M. 83; *Parry v. Morrit* (1833) 1 M. & R. 279; *Iruin v. Lever* (1860) 2 F. & F. 297; compare the decisions as to production of documents under process of discovery; see Peile on Discovery, 1883, p. 133.

(*h*) *Partridge v. Coates* (1824) Ry. & M. 153, 156; *Burton v. Payne* (1827) 2 C. & P. 520.

(*i*) *Baldney v. Ritchie* (1816) 1 St. 338.

(*k*) *Taplin v. Atty* (1825) 3 Bing. 164.

(*l*) *Parry v. Morrit* (1833) 1 M. & R. 279.

(*m*) *Evans v. Sweet* (1824) Ry. & M. 83.

(*n*) See pp. 249, 250.

notice; the clerk who is called to prove the service, may give in evidence a copy.

When once production has been refused by a party duly called on, he is precluded from afterwards giving the document in evidence for any purpose (*o*).

§ 2.—Species of Secondary Evidence.

The law recognizes no degrees in secondary evidence. If the original is not produced for any of the causes above stated, parol evidence may always be given of its contents. If indeed the party giving such parol evidence appears to have better secondary evidence in his power, which he does not produce, that is a fact to go to the jury, from which they might probably presume that the evidence kept back would be adverse to the party withholding it. But the law makes no distinction between one class of secondary evidence and another (*p*).

The most satisfactory secondary evidence however which in fact a party can adduce is always an accurate copy.

In a civil action if the document is in the possession of his opponent, a copy of it can be obtained by discovery and inspection as already mentioned (*q*). The party can then by means of a notice to admit call on his opponent to admit that the copy is a true copy of the original document and so save himself the trouble and cost of calling evidence to prove its accuracy (*r*). And in any case where the party has in his possession a copy of the document and it is reasonable to call on his opponent to admit that the copy is a true copy, he can call on him to make such admission (*s*). Where however

(*o*) *Doe v. Hodgson* (1840) 12 A. & E. 135; *Collins v. Gashon* (1860) 2 F. & F. 47; ep. R. S. C., Order XXXI r. 15; and see pp. 250, 251.

(*p*) *Doe v. Ross* (1840) 7 M. & W. 102, 106.

(*q*) See pp. 251, 252.

(*r*) See the form of notice to admit, p. 314.

(*s*) As to when it is reasonable to serve a notice to admit, and the result of an unreasonable refusal to make the admission asked for, see pp. 267, 268.

this procedure is not resorted to, or where no admission is given, and also in all criminal proceedings, in which discovery, inspection and notice to admit have no place, the party must give such secondary evidence as may be within his power without the aid of this special procedure.

Such secondary evidence may take the form either of a copy proved by a witness to have been made from or compared with the original document; or of oral evidence of its contents based on the witness's recollection; or any admission binding on his opponent, as, for example, the statement of his counsel in open court on a former trial of the action as to the contents of the document (*t*); or an entry made by a deceased clerk in the course of his duty as to its contents (*u*); in short, any one of the media of proof mentioned in Part III which may be applicable to the case. Moreover, in one case at least, that of wills, a special medium of proof is admitted; for whenever a question arises as to the contents of a will which has been lost or destroyed, evidence may be given of declarations of the testator, whether made before or after the alleged date of its execution, with regard to the intentions he had formed or the dispositions he had made (*x*).

§ 3.—Presumptions as to the Original.

It has been already stated that secondary evidence is only admissible where the original document, if produced, would have been admissible. It does not however follow that every particular which would have been necessary to the admission of the original must therefore in all cases be proved before any secondary evidence can be given. The proof of the original is in some cases facilitated by means of presumptions made in its favour.

(*t*) *Doc v. Ross* (1840) 7 M. & W. 102.

(*u*) *Pritt v. Fairclough* (1812) 3 Camp. 305; see above, p. 255.

(*x*) *Johnson v. Lyford* (1868) L. R. 1 P. & D. 546; *Sugden v. Lord St. Leonards* (1876) 1 P. D. 154; see above, pp. 256, 259.

Where a party tenders secondary evidence of a document which his opponent has refused to produce, upon his giving some evidence of the execution of the original, a presumption arises that it was duly attested, if attestation was required (*y*), and that it was duly stamped (*z*); and it lies on his opponent, if he contends the contrary, to make out his objection. Similarly in the case of a document lost or destroyed, after some reasonable evidence of the execution and of the loss or destruction of the original, it will be presumed in favour of the party tendering the secondary evidence, until the contrary is shown, that the document was duly attested (*a*) and stamped (*b*).

There seems to be no reason why like presumptions should not be made in the case of documents lawfully withheld either by a person out of the jurisdiction, or by a person within the jurisdiction making a well-founded claim of privilege.

(*y*) *Cooke v. Tanswell* (1818) 8 Taunt. 450; *Poole v. Warren* (1838) 8 A. & E. 582.

(*z*) *Crisp v. Anderson* (1815), 1 St. 35.

(*a*) *R. v. St. Giles* (1853) 1 E. & B. 642.

(*b*) *Marine Investment Co. v. Haviside* (1872) L. R. 5 H. L. 624.

CHAPTER VII.

PUBLIC DOCUMENTS.

It has already been stated that the term public document is used in two different senses, and that whereas some documents called public, as a will of personalty, stand on the same footing as private documents so far as their effect in evidence is concerned, while others are a medium of proof of the facts recorded in them, they all have this characteristic, that they are kept in some special custody and are proved by means of a copy and not by the production of the original (*a*). This chapter is concerned with the mode of proof of public documents without regard to the effect of their contents in evidence.

At common law when a document was of such a character that its preservation and settled custody was of concern to the public at large or to a considerable section of the public, the production of the original was generally either excused or disapproved of by the court, and the document was admitted to proof by means of a copy. Thus it was laid down that the proper mode of proving entries in the books of the Bank of England, which are of great public concern, was by means of copies (*b*) ; and the books of ancient corporations and of manorial courts were allowed to be proved in the same way (*c*). The ordinary mode of proof of such documents was by means of an examined copy, that is, a copy taken on behalf of the party, generally by some clerk

(*a*) See p. 178.

(*b*) *Mortimer v. McCallan* (1840) 6 M. & W. 58.

(*c*) See App. A, pp. 306, 307.

or other private person, who produced it in the witness-box and proved that he had examined it with the original and that it was correct (*d*). The cases do not throw much light on the question what evidence if any it was necessary in such case to give of the original, but it seems that whereas judicial notice would be taken of the existence, authenticity and custody of those of wide public importance, such as the journals of the Houses of Parliament or the books of the Bank of England, and especially of such as were recorded and kept in pursuance of statutory provisions, such as land-tax assessments, some evidence would be necessary on these points with regard to documents of less notoriety, such as the rolls of a manor court (*e*). In cases of the latter description the witness who proved the examined copy or some other person would ordinarily give some evidence to verify the original document.

In order to put the admissibility of copies of public documents on a clearer and more settled footing Lord Brougham's Act, 14 & 15 Vict. c. 99, by sect. 14 enacted that—

Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof or extract therefrom shall be admissible in evidence in any court of justice or before any person now or hereafter having by law or by consent of parties authority to hear, receive and examine evidence, provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words.

The section does not define what is intended by the words

(*d*) *Lynch v. Clarke* (1695) 3 Salk. 154; *Reed v. Lamb* (1860) 29 L. J. Ex. 452.

(*e*) See p. 307, and cp. p. 17.

“of such a public nature as to be admissible in evidence on its mere production from the proper custody.” It has been held that the parish registers of baptisms, marriages and burials which have been kept in pursuance of canon and statute law answer this description (*f*), but it seems doubtful whether it would be held to comprise the rolls of manor courts or the books of old corporations, or any others which ordinarily require some verification as aforesaid.

Before this general act several statutes had enacted provisions with regard to the proof of particular public documents by means of certified and other copies, but in consequence of the omission of any provisions dispensing with the proof of the genuineness of such copies, the beneficial effect of the enactments was much diminished. In order to remove this inconvenience the statute 8 & 9 Vict. c. 113, by sect. 1, enacted that—

Whenever by any act now in force or hereafter to be in force any certificate, official or public document, or document or proceeding of any corporation or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book or of any other proceeding, shall be receivable in evidence of any particular in any court of justice, or before any legal tribunal or either house of parliament or any committee of either house, or in any judicial proceeding, the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp and signed, as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence.

The general result of these two statutes therefore seems to be this, that save where some special statutory provision exists as to the mode of proof of a public document, the

(*f*) *Re Hall's Estate* (1852) 22 L. J. Ch. 177; *Re Porter's Trusts* (1856) 25 L. J. Ch. 688.

proof of an examined copy, or the mere production in court of a copy purporting to be certified by a person purporting to have the due custody of the original, will be sufficient *prima facie* proof of a public document, except in the cases where verification of the original was necessary by the common law before an examined copy could be given in evidence.

There are certain other kinds of copies, which are chiefly used for the proof of judicial proceedings, known as office copies (*g*) and exemplifications (*h*). They are official copies, of somewhat different form, issued from the offices of a court of justice and authenticated by the seal of the office, of which judicial notice is taken (*i*).

Some of the public documents in most frequent use for purposes of evidence are set forth in Appendix A. It is necessary, in referring to it, to bear in mind the Observations on page 293.

(*g*) See "Judicial Proceedings," pp. 302, 303.

(*h*) See "Succession," p. 309.

(*i*) See p. 16.

APPENDIX A.

PUBLIC DOCUMENTS - - - - 294—310



APPENDIX B.

FORMS - - - - - 311—315

OBSERVATIONS

FOR USE OF APPENDIX A.



1. In the first column of the Appendix no reference has been made to the statutes 8 & 9 Vict. c. 113, s. 1, and 14 & 15 Vict. c. 99, s. 14. The cases in which these provisions are brought into play are stated in the last chapter.

2. In the third column the words “copy,” “office copy,” “certified copy,” “authorized,” “signed,” “sealed,” “stamped,” “printed,” “published,” &c., &c., &c., must be read as if the words “purporting to be” were in each case inserted before them. No evidence, nor anything but the production of the copy or other document specified, is required except where it is so stated.

3. In the same column wherever the words “examined copy,” “verified,” “proved,” &c., &c., are used, evidence will be necessary accordingly.

PUBLIC DOCUMENTS.



Title, and Source.	Facts to be Proved.	Mode of Proof; and see p. 293.
Acknowledgments of Married Women. (i) Made before 1883. 3 & 4 Will. 4, c. 74, ss. 84, 88. Ord. LXI. rr. 1, 1a. 45 & 46 Vict. c. 39, s. 7. (ii) Made since 1882. Stat. last cited, and Rules Dec. 1882, rr. 5, 6.	(i) Married woman's acknowledgment of a deed as her deed. (ii) Do. do.	(i) Office copy from Central Office of filed certificate of acknowledgment. (And see "Public Records.") (ii) Married woman's deed with memorandum of acknowledgment thereon signed by a person authorised to take the acknowledgment.
Arrangement, Deeds of. 50 & 51 Vict. c. 57, ss. 6—11.	Execution, due registration and terms of deed of arrangement.	Office copy from Central Office of the registered copy deed of arrangement.
Bankers' Books. 42 Vict. c. 11. 45 & 46 Vict. c. 72, s. 11 (2).	Entries in bankers' books (<i>i. e.</i> ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank), and the matters, transactions and accounts therein recorded.	Examined copy of the entries, verified by oral evidence in court or by affidavit, after proof by a partner or official either oral or by affidavit that the book was one of the ordinary books of the bank, that the entries were made in the usual and ordinary course of business, and that the book is in the custody or control of the bank.
Bankruptcy. 46 & 47 Vict. c. 52, s. 132. s. 20 (2), r. 193.. s. 35 (3), r. 194.. r. 298 r. 204 (2) s. 30 (3), r. 242.. s. 13 Receiving order.	(a) Any facts stated in any notice inserted in the London Gazette, as <i>e. g.</i> — adjudication, annulment thereof, appointment of trustee, approval of scheme or composition, discharge,	(a) Copy of the Gazette containing the notice.

copy thereof so sealed or signed, or a copy certified as a true copy by any registrar of the court.

(c) Original order or certificate sealed with the seal of the Board or signed by a secretary or assistant secretary of the Board, or by any person authorised in that behalf by the President of the Board. If also certified under hand of the President it is conclusive.

(d) Minutes of proceedings signed by the chairman of the same or the next meeting.

(e) The deposition or a copy thereof sealed with the seal of the court.

(f) Certificate of the official receiver that the composition or scheme has been duly accepted and approved.

(g) The official receiver's report, produced on the bankrupt's application for his discharge.

An examined or certified copy of the entry of the baptism made by a minister of the parish in the register of baptisms kept in the custody of a minister of the parish, or of the entry in the copy register transmitted to and kept in the registry of the diocese. (See note (2), p. 310.)

Office copies of registered copy bill of sale and of affidavit of execution; also of affidavit of renewal, if any.

or document made or used in the course of any proceedings under the Act.

(c) Order or certificate of the Board of Trade made under the Act.

(d) Proceedings at a meeting of creditors under the Act, and the regularity thereof.

(e) Facts deposed to in a proceeding under the act by a debtor, his wife, or a witness, since deceased.

(f) The validity of a composition or scheme.

(g) The facts stated in the report of the official receiver as to conduct and affairs of bankrupt.

Baptism according to the rites of the Church of England, date thereof, christian name of child, and names of parents; and in case of baptisms since 1812, also the abode and quality, trade or profession of the parents. (See note (1), p. 310.)

Due execution and attestation of bill of sale, terms thereof, and fact and date of registration; also fact and date of renewal of registration if any.

s. 140.

s. 133.

46 & 47 Vict. c. 140, s. 136.

53 & 54 Vict. c. 71, s. 3 (13).

s. 8 (5).

Baptism.

70th Canon of 1603.

52 Geo. 3, c. 146.

Re Hall's Estate (1852) 22 L. J.

Ch. 177.

Re Porter's Trusts (1856) 25 L. J.

Ch. 688.

Doe v. Fowler (1850) 14 Q. B. 700.

Bills of Sale.

41 & 42 Vict. c. 31, ss. 10, 16.

45 & 46 Vict. c. 43.

of or of the entries (see note (a), p. 319), or entries similarly certified in the minute-books of the Board.

- (b) The original order, certificate, scheme or document under the seal of the Board, *or* a copy, certified as aforesaid, of the entry thereof, similarly certified in the minute-books of the Board.
- (c) Copy of the deed, will or document made from such books of enrolment and certified under the hand of the secretary or of one of the Commissioners.
- (d) The certificate of incorporation under the seal of the Board, *or* such certified copy of the entry thereof as mentioned above (b).

A copy, certified by an inspector under the Act, of such special rules.

- (a) Certificate under the common seal of the company specifying the share or shares or stock held by such person.

- (b) The company's register of members kept at its registered office, *or* an examined or certified copy thereof.

- (c) The company's minute-books, containing minutes of such resolutions and proceedings signed by the chairman of the same or of the next meeting, *or* an examined or certified copy thereof.

- (b) Order, certificate, scheme or document of the Board.

- (c) Deed, will or document relating to any charity and enrolled in the books of the Board.

- (d) Fact and date of valid incorporation of the trustees of any charity for religious, educational, literary, scientific or public charitable purposes.

The terms of special rules established in a coal mine, and that they have been duly established according to the Act.

- (a) That a person is a member of the company entitled to a particular share or shares or stock in the company.

- (b) Any matters directed or authorised to be inserted in the register of members, as

1. Names, addresses and occupations of members, with dates of membership, shares held and amounts paid on same.

2. Annual list of members and particulars of company's capital, &c., and

3. Particulars as to share warrants issued.

- (c) Resolutions and proceedings of general meetings of a company, or of meetings of its directors or managers, and the regularity thereof respectively.

s. 42.

35 & 36 Vict. c. 24, s. 6.

Coal Mines.

50 & 51 Vict. c. 58, s. 56.

Companies Acts.

25 & 26 Vict. c. 89, s. 31.

s. 37.

s. 25.

s. 26.

43 Vict. c. 19, s. 6.

30 & 31 Vict. c. 131, s. 31.

25 & 26 Vict. c. 89, s. 67.

Title, and Source.	Facts to be Proved.	Mode of Proof; and see p. 293.
Companies Acts—continued.		
25 & 26 Vict. c. 89, ss. 18, 174 (5), 192.		
40 & 41 Vict. c. 26, s. 6.		
42 & 43 Vict. c. 76, s. 9.		
<i>Re Burnell's Banking Co., Peel's case</i> (1867) 2 Ch. 674.		
<i>Oakes v. Turpin</i> (1867) L. R. 2 H. L. 325, 354.		
25 & 26 Vict. s. 174 (5).		
40 & 41 Vict. c. 26, s. 6.		
25 & 26 Vict. c. 89, s. 17 s. 34 s. 40	(c) The terms of any document filed and registered at the office for the registration of joint stock companies, as memorandum and articles of association, notice of increase of capital or members, notice of situation of registered office of company, and of any change therein, copy of company's register of directors, copy of every special resolution, report of order of dissolution, return of general meeting for reception of full account of voluntary winding-up, copy of order of court and minute as to reduction of capital, order confirming alteration of memorandum, deed of settlement or constitution, and terms of altered memorandum or deed, or substituted memorandum and articles.	(e) Copy of the document, certified to be a true copy thereof under the hand of the Registrar of Joint Stock Companies or of an assistant registrar.
30 & 31 Vict. c. 131, s. 15, and 40 & 41 Vict. c. 26, s. 4, 53 & 54 Vict. c. 62, s. 2.....		
Companies Clauses Acts.		
8 Vict. c. 16, s. 98.		
	(a) Appointments and contracts made by the directors, and orders and proceedings of meetings of the company, and of meetings of the directors and	(a) The company's minute-books, containing minutes of such appointments, &c. respectively signed by the chairman of the meeting at which they took place or an examined or certified copy

Debentures.

- 28 & 29 Vict. c. 78, ss. 9, 20, 27,
31, 32.
33 & 34 Vict. c. 20, s. 11.

Copyright.

- (i) Book or Dramatic or Musical
Piece.
5 & 6 Vict. c. 45, s. 11.

- (ii) Painting, Drawing or Photo-
graph.
25 & 26 Vict. c. 68, ss. 4, 5.

Death.

- 6 & 7 Will. 4, c. 86, ss. 32, 34,
37, 38.
37 & 38 Vict. c. 88, ss. 32, 37, 38.

Particulars of mortgage debentures of any company incorporated under the Companies Acts or any statute, and particulars of securities of the company upon which the issue of such mortgage debentures is issued.

- (i) (a) Proprietorship in the copyright of a book or of a dramatic or musical piece (as defined by sect. 2) first produced in the United Kingdom, and assignments of or licences affecting the same, and
(b) In the case of dramatic and musical pieces, the right of representation or performance.
(ii) Same facts as mentioned above in paragraph (a) relating to a painting, drawing or photograph first produced in the United Kingdom.

Fact and date of death within England or Wales of person named in the register-book, with sex, age, rank or profession, and cause of death.

An examined or certified copy or extract of or from the register of mortgage debentures or the register of securities, as the case may be, kept in the office of the land registry, *or* of or from the like registers kept in the registered office of the company.

- (a) A copy, certified under the hand of the officer in charge of the book of registry kept at Stationers' Hall and impressed with the stamp of the Stationers' Company, of entries in the said book of registry relating to such book or piece.

- (b) Do. do.

A copy, authenticated as aforesaid, of entries relating to such painting, &c. in the register of paintings, drawings and photographs at the same place.

A copy certified under hand of registrar or registering officer of entry in register-book of deaths in his keeping (*i.e.* book not filled up), *or* copy certified under hand of superintendent registrar of entry in register-book of deaths in his custody (*i.e.* register-book filled up and transmitted by registrar to superintendent registrar to be kept with records of his office), *or* certified copy sealed or stamped with seal of the general registry office of entry in the certified copy register-book kept in that office (*i.e.* those transmitted by the superintendent registrars):

Provided always that such entry is signed by an informant within the meaning of the said Acts, *or* made upon a certificate from a coroner, *and*, if made more than twelve months after the death or finding of the body, made with the authority of the Registrar General and in accordance with the prescribed rules.

PUBLIC DOCUMENTS—continued.

Title, and Source.	Facts to be Proved.	Mode of Proof; and see p. 233.
Ecclesiastical Matters.		
(i) Dilapidations. 34 & 35 Vict. c. 43, ss. 34, 35.	(i) (a) Bishop's order stating the repairs to the buildings of the benefice and their cost for which the late incumbent his executors and administrators is or are liable. (b) Surveyor's certificate of completion of repairs. (c) Surveyor's special certificate of completion by incumbent of substituted works.	(i) (a) Examined or certified copy of the order or certificate filed in the bishop's registry.
s. 46.		(b) Do. do.
s. 50.		(c) Do. do.
(ii) Farming Leases by Incumbents. 5 & 6 Vict. c. 27, s. 14.	(ii) Contents and due execution of lease by incumbent of lands belonging to the benefice, surrender, surveyor's appointment, map or plan, or copy or extract from same, certificate, valuation, or report, made in pursuance of the Act.	(ii) Office copy certified under the hand of the registrar of diocese or peculiar jurisdiction, or his deputy, of the counterpart or attested copy lease, or of other documents respectively deposited in his office.
(iii) Long Leases by Ecclesiastical Corporations. 21 & 22 Vict. c. 57, s. 12 (and see sect. 29 of the incorporated Act).	(iii) Contents and due execution of any lease, grant or confirmation executed by an ecclesiastical corporation under the Act, and of any map, plan, statement, certificate, valuation or report relating thereto.	(iii) Office copy certified under the seal of the Ecclesiastical Commissioners of the counterpart lease, grant or confirmation or any other document respectively.
(iv) Register of Bishop. <i>Arnold v. Bishop of Bath</i> (1829) 5 Bing. 316. <i>Hartley v. Cook</i> (1832) 5 C. & P. 441.	(iv) Contents of any document or entry properly entered in the register.	(iv) Examined or certified copy of any such document or entry respectively.
(v) Relinquishment of Preference. 22 & 24 Vict. c. 91, s. 7	(v) Contents of deed of relinquishment and its due execution, enrolment, and recording in the registry and the fulfilment.	(v) Copy of the record of the deed in the registry of the diocese, duly extracted and certified by the registrar of the bishop.

Witherforce v. Hearfield
(1877) 5 Ch. D. 709.

Enrolled Deeds.

- 12 & 13 Vict. c. 109, ss. 17—19.
Jud. Act (Officers) 1879, ss. 5, 12.
54 & 55 Vict. c. 67, s. 1, paragraph 7.
Ord. LXI. rr. 1, 6—14.
Smartie v. Williams (1694) 1 Salk. 280.
Giles v. Smith (1834) 1 C. M. & R. 462.
Doe v. Lloyd (1840) 1 M. & G. 671.

Inclosure Awards.

- (i) Under Special Acts.
41 Geo. 3, c. 109, s. 35.
3 & 4 Will. 4, c. 87, s. 2.
Cp. Jud. Act (Officers) 1879.
(ii) By consent under Act of 1836.
6 & 7 Will. 4, c. 115, s. 51.
3 & 4 Vict. c. 31, s. 1.
(iii) By the Inclosure Commissioners, or their successors the Land Commissioners, and the Board of Agriculture.
8 & 9 Vict. c. 118, ss. 2, 146.
45 & 46 Vict. c. 38, s. 48.
52 & 53 Vict. c. 30, s. 2.

respectively, deposited in the registry of the diocese, or of or from that deposited and kept with the public books, writings and papers of the parish, and of or from any map or plan annexed thereto respectively. (As to custody of copy deposited with books of parish, see 56 & 57 Vict. c. 73, s. 17.)

The original deed with a certificate, sealed or stamped with the proper seal of the Central Office, or a copy of the enrolment sealed or stamped with such seal, with plan or copy plan annexed thereto respectively. (And see Order LXI r. 13, and "Public Records.")

- (i) A copy or extract of or from the award enrolled, signed by the proper officer, namely, either by the clerk of the peace of the county wherein the lands are situate or his deputy, or by an officer of the High Court of Justice, according as the award was enrolled with the county records or in the court. (See also "Public Records.")
(ii) The same.

- (iii) A copy or extract, certified as a true copy or extract by the clerk of the peace of the county where the lands are situate, of or from the copy confirmed award deposited with him, or, *sempre*, a copy or extract of or from the copy award deposited with the public books, writings and papers of the parish wherein the lands are situate, signed and certified by the incumbent or other officer or person having the custody of them. (As to custody of copy deposited with the books of the parish, see 56 & 57 Vict. c. 73, s. 17.)

land instead of tithes or rent-charge, and of any map or plan annexed to such instrument or agreement. (See note (b), p. 310.)

Due execution (see note (b), p. 310), contents, and enrolment of the deed, and any plan thereto annexed.

- (i) Fact of award and all matters and facts enacted by or recited in it, and any map annexed to and enrolled with it.

- (ii) The same.

- (iii) The same.

Title, and Source.	Facts to be proved.	Mode of Proof; and see p. 293.
Judicial Proceedings:		
(i) Of High Court of Justice. R. S. C. Ord. XXXVII. r. 4. Ord. LXL. rr. 7, 28, 29.	(i) (a) Writs, records, pleadings and documents filed in the High Court of Justice (as to the documents so filed, see R. S. C.). <i>R. v. Scott</i> (1877) 2 Q. B. D. 415.	(i) (a) An office copy, sealed with the seal of the Central Office, of such writ or other document respectively, <i>or</i> the original writ or document produced by an officer of the court in pursuance of an order of a judge or master.
8 & 9 Vict. c. 113, s. 2.	(b) Decrees, orders, certificates and other judicial and official documents signed by any judge of the Supreme Court.	(b) The original decree or other document so signed.
Jud. Act, 1873, s. 61.	(c) Writs and other documents issued out of or filed in any district registry.	(c) The original writ or other document, or an exemplification or copy thereof, sealed with the seal of such district registry.
(ii) Of County Courts. 51 & 52 Vict. c. 43, ss. 28, 180.	(ii) Plaints, summonses, orders, judgments, executions and returns thereto, fines, and all other proceedings in or process issuing out of the court.	(ii) The original summons or other process issued out of the court, sealed or stamped with the seal of the court, <i>or</i> the registrar's minute-book from the office of the court containing the entry of the plaint or other proceeding, <i>or</i> a copy of such entry bearing the seal of the court and signed and certified by the registrar as a true copy thereof.
(iii) Upon Indictments. 14 & 15 Vict. c. 99, s. 13. <i>Richardson v. Willis</i> (1872) L. R. 8 Ex. 69. Cp. 14 & 15 Vict. c. 100, s. 22.	(ii) Trial and conviction or acquittal of any person charged with any indictable offence.	(iii) Copy of the record of the indictment, trial, conviction and judgment, or acquittal, as the case may be, omitting the formal parts thereof, certified under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer. (Cp. 17 & 18 Vict. c. 125, s. 25, and 28 Vict. c. 18, s. 6.)
(iv) Other cases, where no statutory provision. (a) <i>Courts of Record: R. v. Smith</i> (1828) 8 B. & C. 241.	(iv) (a) Any judicial proceedings therein.	(iv) (a) An examined or certified copy of the record duly drawn up. (See note (7), p. 310.)

- (1866) L. R. 1 C. P. 553.
Courts not of Record;
Dyson v. Wood (1824) 3
 B. & C. 449.
Dawson v. Gregory (1845)
 7 Q. B. 756.

Land-Tax Assessments.

- 38 Geo. 3, c. 5, ss. 4, 8, 15, 16.
R. v. King (1788) 2 T. R. 234.
Doe v. Seaton (1834) 2 A. & E. 171.

Marriage.

- (i) In Church of England before
 2 March, 1837.
 70th Canon of 1603.
Re Hall's Estate (1852) 22
 L. J. Ch. 177.

- (ii) In Church of England or
 according to rites of
 Quakers or Jews after
 1 March, 1837.
 6 & 7 Vict. c. 86, ss. 31, 35,
 37, 38.

- (iii) In Dissenting Chapel or
 Registry.
 6 & 7 Will. 4, c. 85, ss. 18,
 20, 21, 23, 24, 44.

- (b) Do. do.

The assessment of any particular lands, and any facts duly entered therein, as *e.g.* the fact that the lands were occupied by the persons and at the times therein mentioned.

- (i) Fact and date of marriage in a parish church or chapel according to the rites of the Church of England before March 2, 1837, and names of parties married.

- (ii) Fact and date of marriage in a church or chapel of the Church of England, or according to the rites of the Quakers, or of the Jews, after March 1, 1837, and the name, age or nomaqe, condition, rank or profession, and residence of the parties; and the name and rank or profession of the father of each party.

- (iii) The same facts as last above-mentioned in respect of marriages in buildings certified as places of religious worship and registered for the solemnization of marriages (as *e.g.* marriages in dissenting churches and chapels) and marriages celebrated in the office of a superintendent registrar.

- (b) Such minute, if any, as is regularly kept in the court, verified by the proper officer of the court, or where no such minutes are kept, oral evidence of the proceedings. (See note (7), p. 310.)

Examined or certified copy of entry in the duplicate assessments in the custody of the collectors of land tax, or in those in the custody of the Commissioners of Land Tax, within whose district or division the lands are situate. (See also "Public Records.")

- (i) Examined or certified copy of the entry of the marriage made by a minister of the parish in the register of marriages kept in the custody of a minister of the parish, or of the entry in the copy register transmitted to and kept in registry of the diocese. (See note (2), p. 310.)

- (ii) Copy certified under the hand of the parson, or in the case of Quakers or Jews of the registering officer or secretary respectively, of the entry of the marriage in the marriage register-book in his keeping, or a certified copy sealed or stamped with the seal of the general register office of the entry of the marriage in the certified copy register-books kept in that office (*i.e.* those transmitted by the superintendent registrars).

- (iii) Copy certified under the hand of the registrar of the entry in the marriage register-book in his keeping, or certified copy sealed or stamped with the seal of the general register office of the entry in the certified copy register-book kept in that office (*i.e.* those transmitted by the superintendent registrars.)

Title, and Source.	Facts to be Proved.	Mode of Proof; and see p. 293.
Medical Registers, &c.		
(i) Apothecaries. 55 Geo. 3. c. 194, s. 21. 14 & 15 Vict. c. 99, s. 8.	(i) The fact of a person's qualification to practise and sue for charges as an apothecary.	(i) Certificate of the qualification as an apothecary under the common seal of the Society of the Art and Mystery of Apothecaries of the City of London.
(ii) Chemists and Druggists and Pharmaceutical Chemists. 31 & 32 Vict. c. 121, s. 13.	(ii) The fact of a person's registration or non-registration as a qualified chemist and druggist or pharmaceutical chemist.	(ii) A copy of the "Registers of Pharmaceutical Chemists and Chemists and Druggists," printed and published in pursuance of the Act, or a certificate under the hand of the registrar countersigned by the president and two members of the council of the Pharmaceutical Society.
(iii) Dentists. 41 & 42 Vict. c. 33, ss. 5, 29.	(iii) (iv) (v) The fact of a person's registration or non-registration as qualified to practise and sue for charges as a dentist, medical practitioner or veterinary surgeon respectively.	(iii) (iv) (v) A copy of the register of dentists, medical register, or register of veterinary surgeons respectively, printed and published in pursuance of the Act relating thereto respectively, or, in case of erroneous omission from any such register, a certificate of the registrar, &c.
(iv) Medical Practitioners. 21 & 22 Vict. c. 90, ss. 15, 27, 32.		
(v) Veterinary Surgeon. 44 & 45 Vict. c. 62, ss. 9, 17.		
Newspapers.	The fact of the registration of a newspaper, its title, and the names, occupations and places of business and of residence of the proprietors thereof.	A copy of the entry in or extract from the register of newspaper proprietors in the principal office of the Registrar of Joint Stock Companies, certified by the registrar or his deputy or under the official seal of the registrar.
Parliament.		

Patents of Invention, Designs and Trade- Marks.

46 & 47 Vict. c. 57.

- (i) Patents,
s. 89, Rules 1883, r. 76.
s. 5, Rules 1883, rr. 8, 9.

ss. 23, 84, 88, 89, 114.

s. 96.

(ii) Designs.

ss. 49, 96.

s. 52, 57, 88, 89.

X

- (i) (a) Patents, specifications, disclaimers, affidavits, statutory declarations and other public documents (as *e.g.* applications) in the Patent Office.

- (b) All matters directed or authorised by the Act to be inserted in the register of patents, as *e.g.* names and addresses of grantees of patents, notifications of assignments and of transmissions of patents, of licences under patents, and of amendments, extensions and revocations of patents, and such other matters affecting the validity or proprietorship of patents as may from time to time be prescribed.

- (c) Fact and contents of any entry and the doing or not doing of any matter or thing which by the Act or General Rules thereunder the comptroller is authorised to make or do.

(ii) (a) Due registration of a design.

- (b) Any matters authorised by or in pursuance of the Act to be entered in the register of designs, as *e.g.* names and addresses of proprietors of registered designs and notifications of assignments and transmissions thereof.

- (i) (a) Printed or written copy or extract, certified by the comptroller and sealed with the seal of the Patent Office, of or from any such patent or other document respectively.

- (b) Printed or written copy or extract, certified by the comptroller and sealed with the seal of the Patent Office, of or from the register of patents at the Patent Office.

- (c) Certificate under the hand of the comptroller stating such fact, contents, &c., &c. respectively.

(ii) (a) Original certificate of registration, or in case of its loss, a copy thereof, granted by the comptroller.

- (b) Printed or written copy or extract certified by the comptroller and under the seal of the Patent Office of or from the register of designs in the Patent Office (subject to the restrictions imposed by sect. 52, as modified by sects. 5 and 6 of 51 & 52 Vict. c. 50).

Title, and Source.	Facts to be Proved.	Mode of Proof; and see p. 293.
PATENTS OF INVENTION, DESIGNS AND TRADE-MARKS—continued. (iii) Trade-Marks. ss. 78, 88, 89.	(iii) The existence of a trade-mark, the name and address of its proprietor, and notifications of assignments and of transmissions thereof and such other matters as may be from time to time prescribed to be registered.	(iii) Printed or written copy or extract, certified by the comptroller and sealed with the seal of the Patent Office, of or from the register of trade-marks (<i>prima facie</i> evidence for five years, conclusive afterwards: sect. 76).
Public Bodies.	(i) (a) The making of an order or the preferring of a complaint, claim or application, or the giving of any authority by any such board.	(i) (a) Copy of the minute of any such order, complaint, &c., or of the resolution to make the same, signed by the presiding chairman of the board, and sealed with their seal and countersigned by their clerk or person acting as their clerk.
(i) Boards of Guardians or District Boards. 5 & 6 Vict. c. 57, s. 17. 7 & 8 Vict. c. 101, s. 69. 11 & 12 Vict. c. 110, s. 11.	(b) The fact and date of the chargeability of a particular pauper to a particular parish.	(b) Certificate signed, sealed and countersigned as aforesaid that the pauper has so become chargeable.
(ii) Borough and County Councils. 45 & 46 Vict. c. 50, ss. 22, 24. 51 & 52 Vict. c. 41, s. 75.	(ii) (a) Proceedings at any meeting of the council or of any committee thereof.	(ii) (a) Minute of such proceedings signed at the same or the next ensuing meeting by the mayor or chairman, as the case may be, of such council or by a member of the council or of the committee, as the case may be, describing himself as or appearing to be chairman of the meeting at which the minute is signed.
(iii) Corporations. <i>R. v. Matherell</i> (1718) 1 Str. 93. <i>R. v. Fraternity of Hostmen of N.</i> (1745) 2 Str. 1223,	(b) Existence and due making of a bye-law of any such council. (iii) Bye-laws and minute-books of corporation, and any facts duly entered in such books.	(b) A written copy of the bye-law authenticated by the corporate seal of the council. (iii) <i>Scample</i> , in the absence of express statutory provision, verified original, or examined copy of or extract from, bye-laws or minute-books respectively, duly entered and authenticated.

authority.

38 & 39 Vict. c. 55, ss. 186,
199, and Sched. I., r. 10.

(b) A minute of such meeting and proceedings or a copy of any order or resolution made or passed thereat, signed by the chairman of the meeting at which the proceedings took place or of the next ensuing meeting.

(v) Verified original or examined copy of or extract from court rolls.

(vi) A minute of the proceedings of such council or meeting signed at the same or the next ensuing meeting by a person describing himself as or appearing to be chairman of the meeting at which the minute is signed.

(vii) A minute of the proceedings signed by any person purporting to be the chairman of the board either at the meeting of the board at which the proceedings took place or at the next ensuing meeting.

(viii) Verified original or examined copies of or extracts from the minute-books of the vestry, duly entered by the proper officer. (As to custody, see now 56 & 57 Vict. c. 73, s. 17.)

A copy examined and certified as a true and authentic copy by the deputy-keeper of the records or by an assistant record-keeper, and sealed or stamped with the seal of the Record Office.

(b) The fact of the holding of a meeting of the local authority and of the proceedings thereat, and that such meeting and proceedings were regular.

(v) The court rolls of the manor and all facts duly entered therein.

(vi) The proceedings of a parish council or parish meeting.

(vii) Proceedings at a meeting of a school-board and the fact that they were regular.

(viii) The proceedings of the vestry.

Contents of public records for the various documents comprised under this title, and the ages at which they are transferred to the Record Office, see Scargill Bird's Guide to the Public Records, and the annual reports of the Deputy-Keeper of the Public Records).

(v) Manor Courts,
Doe v. Hall (1812) 16 East,
208.
Doe v. Mee (1833) 4 B. & Ad.
617.

(vi) Parish Councils and Meetings,
56 & 57 Vict. c. 73, Sched. 2,
pt. 3 (1) (2).

(vii) School Boards,
33 & 34 Vict. c. 75, s. 30 (4).

(viii) Vestries,
R. v. Martin (1809) 2
Camp. 100.
Hartley v. Cook (1832) 5
C. & P. 441.

Public Records.

1 & 2 Vict. c. 94, ss. 12, 13.

Title, and Source.	Facts to be Proved.	Mode of Proof; and see p. 293.
Ships, British. 57 & 58 Vict. c. 60, ss. 11, 64, 693.	(a) Name of ship and of port to which she belongs; (b) Details comprised in surveyor's certificate; (c) Particulars respecting her origin stated in declaration of ownership; (d) Name and description of her registered owner or owners, and, if more than one, the proportions in which they are interested in her.	<i>Sample</i> : Original register-book produced from custody of registrar or other person having the lawful custody thereof, or examined or certified copy thereof or of the register kept by the Registrar-general of Shipping and Seamen, or in the case of (b) and (c), the original certificate of registry signed by the registrar or other proper officer and the original declaration respectively, or examined or certified copies thereof.
Solicitors and Conveyancers. 23 & 24 Vict. c. 127, s. 22.	The fact that a person is or is not qualified to practise as a solicitor or conveyancer.	A copy of the Law List published in pursuance of the Act; provided that, if a person's name does not appear in the list, his qualification as a solicitor may be proved by an extract from the roll of solicitors, certified under the hand of the secretary of the Incorporated Law Society or of the registrar for the time being.
State, Acts of. 31 & 32 Vict. c. 37. 8 & 9 Vict. c. 118, s. 3. 45 Vict. c. 9.	Any proclamation, order or regulation issued by—	A copy of such proclamation, order or regulation contained in the Gazette, or printed by the government printer or her Majesty's Stationery Office (or in the case of a royal proclamation the printers to the Crown or to either House of Parliament), or a copy certified by the following authorities respectively:
	(a) The Queen or the Privy Council;	(a) The clerk or one of the lords or others of the Privy Council.

(d) Secretaries of state; (e) Committee of Privy Council for Trade, or (f) Local Government Board. (34 & 35 Vict. c. 70.)	(d) Any secretary or under-secretary of state. (e) Any member of the Committee of the Privy Council for Trade or any secretary or assistant secretary of the committee. (f) Any commissioner of the Local Government Board or any secretary or assistant secretary of the same.
Succession. 20 & 21 Vict. c. 77. (i) To Personalty. ss. 22, 29, 46, 52, 69, and see forms in App. 2 to Probate Court Rules.	(i) (a) The probate of the will, <i>or</i> an exemplification of the grant of the probate, <i>or</i> an official copy of the will. (b) Letters of administration, <i>or</i> an exemplification thereof, <i>or</i> an official certificate of the grant of such letters. (c) Letters of administration with copy will annexed, <i>or</i> an exemplification thereof, <i>or</i> an official copy of the grant of such letters with will annexed.
(ii) To Realty. (See note (8), p. 310). s. 64.	(ii) The probate of the will or letters of administration with copy will annexed, <i>or</i> an official copy of same respectively, after proof by the party adducing it that he gave his opponent notice in writing ten days before the trial of his intention to give such document in evidence in proof of such disposition, unless his opponent within four days of the receipt thereof has served on him a counter-notice that he disputes the validity of such disposition.

NOTES TO APPENDIX OF PUBLIC DOCUMENTS.



1. *Baptisms*.—It is not clear whether an entry in the register of the date or place of birth or of the fact of illegitimacy is or is not admissible. Against its admissibility are—*Wihen v. Law* (1821) 3 St. 63, *R. v. N. Petherton* (1826) 5 B. & C. 508, *R. v. Clapham* (1829) 4 C. & P. 29, and *Burghart v. Angerstein* (1834) 6 C. & P. 690; for it are—*Cope v. Cope* (1833) 1 M. & R. 269, *Morris v. Davies* therein cited, and *Re Turner, Glenister v. Harding* (1885) 29 Ch. D. 985.

2. *Registers in Registry of Diocese*.—It is not clear whether the official copy of the parish register (whether of baptisms, marriages or burials) deposited in the registry is to be deemed an original public document so as to render it or copies of it admissible without proof of loss or destruction of the original parish register. *Walker v. Beauchamp* (1834) 6 C. & P. 552.

3. *Births*.—It was held in *R. v. Wintle* (1870) 9 Eq. 373, that the register of births was not evidence of the date, only of the fact, of the birth. This seems erroneous; see per Erle, J., in *Doe v. Andrews* (1850) 15 Q. B. 756 at p. 759, and the scheduled form of entry in the register.

The entry is only evidence of the place of birth when this fact is entered by the express order of the registrar-general. See 7 Will. 4 & 1 Vict. c. 22, s. 8.

4. *Certificate of Clerk to Charity*.—If the copy is certified by the chief clerk, the absence of the secretary, which is a condition precedent to his so certifying, will be presumed. *Baker v. Cave* (1857) 1 H. & N. 674.

5. *Tithe Apportionment*.—In *Wilberforce v. Hearfield* it was held that a tithe map was not evidence of boundaries. But *quere* whether the same considerations do not apply here as in the case of land tax assessments.

6. *Enrolments*.—It is not clear that the prescribed proof of enrolment covers also the due execution of the deed; but the balance of authority seems in favour of that view.

7. *Judicial Proceedings*.—*Semble* that where it is sought to prove a previous proceeding of the same court, the minute-books of the court, without any formal record, are sufficient evidence. See *R. v. Tooke* (1794) 25 St. Tr. 447, *R. v. Hutchins* (1880) 5 Q. B. D. 353.

8. *Will of Realty*.—Where no such notice is given, and in all cases where the will relates to realty alone, it must be proved by or through the attesting witnesses, as stated at pp. 264—266.

APPENDIX B.

FORMS.

No. 1.

Notice to Admit Facts.

[*Title of Action.*]

Take notice that the plaintiff [*or defendant*] in this cause requires the defendant [*or plaintiff*] to admit, for the purposes of this cause only, the several facts respectively hereunder specified; and the defendant [*or plaintiff*] is hereby required, within six days from the service of this notice, to admit the said several facts, saving all just exceptions to the admissibility of such facts as evidence in this cause.

Dated, &c.

G.D., solicitor [*or agent*] for the plaintiff [*or defendant*].

To E.F., solicitor [*or agent*] for the defendant [*or plaintiff*].

The facts, the admission of which is required, are—

1. That John Smith died on the 1st of January, 1870.
2. That he died intestate.
3. That James Smith was his only lawful son.
4. That Julius Smith died on the 1st of April, 1876.
5. That Julius Smith never was married.

No. 2.

Admission of Facts, pursuant to Notice.

[*Title of Action.*]

The defendant [*or plaintiff*] in this cause, for the purposes of this cause only, hereby admits the several facts respectively hereunder specified, subject to the qualifications or limitations, if any, hereunder specified, saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this cause.

Provided that this admission is made for the purposes of this action only, and is not an admission to be used against the defendant [*or plaintiff*] on

any other occasion, or by anyone other than the plaintiff [*or* defendant, *or* party requiring the admission].

Delivered, &c.

E.F., solicitor [*or* agent] for the defendant [*or* plaintiff].

To G.H., solicitor [*or* agent] for the plaintiff [*or* defendant].

Facts admitted.	Qualifications or Limitations, if any, subject to which they are admitted.
1. That John Smith died on the 1st of January, 1870.	1.
2. That he died intestate.	2.
3. That James Smith was his lawful son.	3. But not that he was his only lawful son.
4. That Julius Smith died.	4. But not that he died on the 1st of April, 1876.
5. That Julius Smith never was married.	5.

No. 3.

Interrogatories.

[*Title of Cause or Matter.*]

Interrogatories on behalf of the above-named [*plaintiff, or defendant C.D.*] for the examination of the above-named [*defendants E.F. and G.H., or plaintiff*].

1. Did not, &c.

2. Has not, &c.

&c. &c. &c.

[*The defendant E.F. is required to answer the interrogatories numbered .*]

[*The defendant G.H. is required to answer the interrogatories numbered .*]

No. 4.

Answer to Interrogatories.

[*Title of Cause or Matter.*]

The answer of the above-named defendant E.F. to the interrogatories for his examination by the above-named plaintiff.

In answer to the said interrogatories, I, the above-named E.F., make oath and say as follows :—

Sworn, &c.

No. 5.

Notice to Produce Documents at the Trial.

[Title.]

Take notice that you are hereby required to produce and show to the Court on the trial of this all books, papers, letters, copies of letters, and other writings and documents in your custody, possession, or power, containing any entry, memorandum, or minute relating to the matters in question in this , and particularly [*here describe the particular documents*].

Dated the day of , 18 .

To the above-named

h solicitor or agent

} (Signed) , of
agent for , solicitor
for the above-named .

No. 6.

Affidavit as to Documents.

[Title of Cause or Matter.]

I, the above-named defendant C.D., make oath and say as follows:—

1. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto.

2. I object to produce the said documents set forth in the second part of the said first schedule hereto.

3. That [*here state upon what grounds the objection is made, and verify the facts as far as may be*].

4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto.

5. The last-mentioned documents were last in my possession or power on [*state when*].

6. That [*here state what has become of the last-mentioned documents and in whose possession they now are*].

7. According to the best of my knowledge, information, and belief, I have not now, and never had in my possession, custody, or power, or in the possession, custody, or power of my solicitors or agents, solicitor or agent, or in the possession, custody or power of any other persons or person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper, or writing, or any copy of or extract from any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the said first and second schedules hereto.

No. 7.

Notice to produce Documents for Inspection under Order XXXI.

[Title of Cause or Matter.]

Take notice that the [*plaintiff or defendant*] requires you to produce for his inspection the following documents referred to in your [*statement of claim, or defence, or affidavit, dated the day of A.D.*].

[*Describe documents required.*]

X.Y., Solicitor to the .

To Z., Solicitor for .

No. 8.

Notice to inspect Documents under Order XXXI.

[Title of Cause or Matter.]

Take notice that you can inspect the documents mentioned in your notice of the day of A.D. [except the deed numbered in that notice] at [insert place of inspection] on Thursday next the instant between the hours of 12 and 4 o'clock.

Or, that the [plaintiff or defendant] objects to giving you inspection of the documents mentioned in your notice of the day of A.D. , on the ground that [state the ground]:—

No. 9.

Notice to admit Documents.

[Title.]

Take notice that the plaintiff [or defendant] in this cause proposes to adduce in evidence the several documents hereunder specified, and that the same may be inspected by the defendant [or plaintiff], his solicitor or agent, at , on , between the hours of ; and the defendant [or plaintiff] is hereby required, within forty-eight hours from the last-mentioned hour, to admit that such of the said documents as are specified to be originals were respectively written, signed, or executed, as they purport respectively to have been; that such as are specified as copies are true copies; and such documents as are stated to have been served, sent, or delivered, were so served, sent, or delivered respectively; saving all just exceptions to the admissibility of all such documents as evidence in this cause.

Dated, &c.

(Signed)

G.H., solicitor [or agent] for plaintiff [or defendant].
To E.F., solicitor [or agent] for defendant [or plaintiff].

[Here describe the documents, the manner of doing which may be as follows:—]

ORIGINALS.

Description of Documents.	Dates.
Deed of covenant between A.B. and C.D. first part, and E.F. second part.....	January 1, 1888.
Indenture of lease from A.B. to C.D.....	February 1, 1888.
Indenture of release between A.B. and C.D. first part, &c.	February 2, 1878.
Letter—defendant to plaintiff	March 1, 1878.
Policy of insurance on goods by ship "Isabella," on voyage from Oporto to London	December 3, 1877.
Memorandum of agreement between C.D., captain of said ship, and E.F.	January 1, 1848.
Bill of exchange for £100 at three months, drawn by A.B. on and accepted by C.D., indorsed by E.F. and G.H.	May 1, 1849.

COPIES.

Description of Documents.	Dates.	Original or Duplicate served, sent, or delivered, when, how, and by whom.
Register of baptism of A.B. in the parish of X.	January 1, 1848.	
Letter—plaintiff to defendant	February 1, 1888	Sent by General Post, February 2, 1888.
Notice to produce papers	March 1, 1888 ..	Served March 2, 1888, on defendant's attorney by E.F. of .
Record of a judgment of the Court of Queen's Bench in an action, <i>F.S. v. F.N.</i>	Trinity Term, 10th Viet.	
Letters patent of King Charles II. in the Rolls Chapel.	January 1, 1680.	

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